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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1226

THE CHESAPEAKE AND CURTIS BAY RAILROAD COMPANY AND THE WESTERN MARYLAND RAILWAY COMPANY,

Petitioners,

vs.

RICHFIELD OIL CORPORATION OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND AND BRIEF IN SUPPORT THEREOF.

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Petitioners,

vs.

RICHFIELD OIL CORPORATION OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, The Chesapeake and Curtis Bay Railroad Company and The Western Maryland Railway Company, respectfully pray for a writ of certiorari to review a decree of the Court of Appeals of the State of Maryland entered February 9, 1942 (R. 275) which affirmed a decree of the Circuit Court No. 2 of Baltimore City.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Richfield Oil Corporation, a body corporate of the State of Delaware, acquired by purchase and grant on October 6th, 1939, a tract of land in Baltimore City, whereon for more than twenty-five years has been operated a manufacturing plant for the production from raw material of asphalt and gasoline and oil and petroleum (R. 2-3).

The Chesapeake and Curtis Bay Railroad Company, a railroad corporation of the State of Maryland, by deed dated September 11th, 1925, acquired certain parcels of land in the City of Baltimore, in the State of Maryland, from the United States Asphalt and Refining Company (R. 11, 55). On and over these parcels of land the Chesapeake and Curtis Bay Railroad Company, a public carrier, whose terminii and railway are wholly within the State of Maryland, has conducted its railway business. The Western Maryland Railway Company, a body corporate of the State of Maryland, a connecting public carrier, whose interstate railway extends from the city of Baltimore, in the State of Maryland, to terminii without the State of Maryland, is and has been long engaged in the intrastate and interstate transportation by rail for hire of intrastate and interstate commerce.

The Chesapeake and Curtis Bay Railroad Company is a link in the interstate railway system of the Western Maryland Railway Company whereby the latter Company acquired terminal facilities and docks adequately to receive and discharge at Curtis Bay the water-borne Chesapeake Bay, interstate, coastal and oceanic commerce (R. 10A, 55,

105-106). The stock of this Company was acquired by the Western Maryland Railway Company in November 1926 (R. 211). Since then the Company has been operated by the Western Maryland Railway Company as a constituent part of its interstate railway system.

Before the incorporation of the Chesapeake and Curtis Bay Railroad Company, the United States Asphalt Refining Company had acquired title in all the land with which the record is concerned, subject to certain outstanding ground rents. For the purposes of its enterprise, the Asphalt Company had constructed its industrial railway through its property and had erected tanks, stills, buildings and other structures for use in its industry and had laid a connected system of underground pipe lines to carry oil from one part of the property to another. Some of these lines passed under its private railroad tracks at various points. A public highway called the "Wagner's Point Road" ("North Avenue", "or North Bridge Avenue") traversed the property from east to west, and, dividing the property in approximately two equal portions, crossed these railroad tracks at grade. As shown by the plat (R. 10A, 55) the various structures of the Asphalt Company were mainly grouped towards Curtis Bay on the southern portion of the property and on both sides of the railroad tracks. Near the waterfront the buildings on opposite sides of the track were served by an industrial track crossing the main line at right angles.

Broadly speaking this was the physical situation in 1916 when the Chesapeake and Curtis Bay Railroad Company was incorporated by those in control of the Asphalt Company. The next step was to vitalize the new corporation and so it acquired the necessary property and facilities for railway operation (R. 125).

The United States Asphalt Refining Company, the predecessor in title, of the Richfield Oil Corporation of New York, by deeds of March 16, 1916, and January 2, 1924, "conveyed the right of way for railroad purposes in and to certain tracts of land" to The Chesapeake and Curtis Bay Railroad Company to be used for its operation as appears by the recitals in the deed of the said Company to the Railroad Company of September 11th, 1925. The recitals of this deed further show that in the intervening periods the Railway Company had used the larger part of the land conveyed, along with some small portions of the contiguous lands of the grantor for the operation of the grantee's railroad, but that certain small portions of the land granted had not been used or considered necessary for use for the operation of said railroad. For the purpose of defining and conveying the parcels of land required by the Railroad Company and restoring to the Asphalt Refining Company the title to the land not needed by the Railroad Company, the deed of September 11, 1925 (R. 11, 55) was executed by both Companies. On the part of the Railroad Company it granted to the Refining Company all the right, title and interest of the Railroad Company in the parcels of land theretofore conveyed to the Railroad Company which were not embraced within the description of the parcels of land particularly described in the deed, and shown on the plat which was made a part of the deed. On the part of the Refining Company, it granted unto the Railroad Company, its successors and assigns, "the rights of way for railroad purposes" in and to certain lots of land which were particularly described and platted, subject, however, to a reservation which is hereafter set forth.

The parcels of land, which were conveyed by description in detail were nine in number, and the descriptions were thus headed:

Parcel No. 1.

Main Track and Yards—8.967 acres (R. 13-15) (Main track generally 30 feet wide. Yards: 300 feet by 700 feet, estimated from Plat, 11 parallel tracks. Plaintiff's Exhibit B. (R. 10A).

Parcel No. 2.

Right of Way for Tracks 38, 47, 48—3.510 acres (R. 15-16).

Parcel No. 3.

Right of Way for Track No. 3—.162 acre (R. 16).

Parcel No. 4.

Right of Way for Track No. 4—.437 acre (R. 16-17), also parcels a, b, c. (quantity not given).

Parcel No. 5.

Right of Way for Track No. 8—.310 acre (R. 17).

Parcel No. 6.

Right of Way for Track No. 13—.407 acre (17).

Parcel No. 7.

Right of Way for Track No. 15—.551 acre (R. 18).

Parcel No. 8.

Right of Way for Track No. 49—.388 acre (R. 18).

Parcel No. 9.

Right of Way for Track No. 50—.268 acre (R. 18-19).

Then follows the clauses:

"Being all that portion of the lots of ground heretofore conveyed by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company by the Deeds hereinbefore recited, and the right of way for railroad purposes in such other land of the said The United States Asphalt Refining Company, not heretofore conveyed to the said The Chesapeake and Curtis Bay Railroad Company, as is now used by the said The Chesapeake

and Curtis Bay Railroad Company in the operation of its railroad as aforesaid.

TOGETHER with all and every, the rights, alleys, ways, waters, privileges, appurtenances and advantages, to the same belonging, or anywise appertaining.

TO HAVE AND TO HOLD the said described right of way and the railroad tracks thereon unto and to the use of the said The Chesapeake and Curtis Bay Railroad Company, its successors and assigns, saving and reserving, however, to the said The United States Asphalt Refining Company, its successors and assigns, and to The Interocean Oil Company, a corporation duly incorporated, its successors and assigns, a joint use in such parts of said right of way as may now be occupied by any tanks, stills, or buildings of the said The United States Asphalt Refining Company and the said The Interocean Oil Company, now erected thereupon, and for such time as the same may remain thereupon." (R. 18-19).

(Note: The Interocean Oil Company above mentioned was an existing corporation of South Dakota, and has no connection with the Interocean Oil Company hereinafter referred to.)

Following this deed of the Asphalt Company to the Railroad Company, the Asphalt Company on October 5, 1925, acquired by deed from The Curtis Bay Company, the outstanding ground rents so that from that date the merger of the leasehold and ground rent gave an absolute fee simple title in the land to the Asphalt Company (R. 39, 55, 245) which on October 5, 1925 conveyed to the Interocean Oil Company of Delaware, in fee simple its tract of land of 107.72 acres at Curtis Bay by a description which embraced in its outlines the nine parcels previously described in the deed to the Railway Company, but these nine parcels were excepted by this explicit provision of the deed:

> *"Saving and excepting, however, from the above described land such portions* as is described and conveyed to the Chesapeake and Curtis Bay Railroad Company by and in a deed of exchange and in the (plat) annexed hereto made between the said United States Asphalt Refining Company and the Chesapeake and Curtis Bay Railroad Company dated September 11th, 1925, recorded or intended to be recorded among the Land Records of Baltimore City prior hereto, with the benefit, however, to the said party of the second part, its successors or assigns, of the reservations mentioned in said deed of exchange relating to the joint use of such parts of the right of way of said railroad as may now be occupied by any tanks, stills or buildings therein as recited in said deed" (R. 38, 55). (Italics supplied.)

Contemporaneously with this grant to it, the Interocean Oil Company of Delaware executed a deed of trust to The Century Trust Company on October 5, 1925, conveying the property thus acquired to secure an issue of bonds by said grantor. The deed described with particularity the four parcels of land conveyed by this deed of trust, containing, respectively, ninety-two acres (first parcel); five acres (second parcel); two acres (third parcel), and eight and seventy-two one hundredths acres (fourth parcel), subject, however, to these clear and certain exemptions:

> *"Saving and excepting, however, from the above described land such portions* as are described in a deed of exchange and in the plat thereto attached between the United States Asphalt Refining Company and the Chesapeake and Curtis Bay Railroad Company, dated September 11, 1925, recorded or intended to be recorded among the Land Records of Baltimore City prior hereto" (R. 39, 45, 55). (Italics supplied.)

At the time of the execution and delivery of these deeds, the land of the Asphalt Company, which was conveyed to

the Interocean Oil Company of Delaware, and by it to The Century Trust Company as trustee for the bond issue, was divided east and west, by the property of the Railroad Company, which ran from the waters of Curtis Bay on the south in a northeasterly direction through this land. Access by highway to the severed parts was provided by the public road, known as the "Wagner's Point Road" or "North Avenue", which ran then, as it has ever since, dividing the property in approximately two equal parts, and crossing the railroad tracks at grade. From the main tracks, industrial sidings or tracks afforded facilities for transfer, shipping and carriage from either side of the Railway. In addition, there subsisted certain underground pipe lines for the flow of oil which passed through the right of way of the Railroad Companay (R. 60 and see plat 10A, 55).

The Interocean Oil Company of Delaware was unsuccessful and, after default, the mortgage lien to secure its bond issue as aforesaid was foreclosed in the course of a receivership wherein Joseph P. Connor, the receiver—appointed by the United States District Court for the District of Maryland, as Special Master, granted and conveyed to the Richfield Oil Corporation of New York the property conveyed by the Interocean Oil Company to The Century Trust Company of Baltimore for the purpose of securing the bonds issued by the Interocean Oil Company of Delaware. So, the title of the said Richfield Oil Corporation of New York depends upon and is limited by the grant of the mortgage deed (R. 53-54).

Annotated Code of Maryland (1924) title, "Mortgages", Article 66, Sec. 11, Vol. 2, p. 2202; *Idem.* (1939) Art. 66, Sec. 12, Vol. 2, p. 2617:

> "All such sales, when confirmed by the court and the purchase money is paid, shall pass all the title which

the mortgagor had in the said mortgaged premises at the time of the recording of the mortgage."

Mitzen v. Thomas (1928) 156 Md. 323,
Sullens v. Finney (1914) 123 Md. 657,
Smith v. Pritchett (1934) 168 Md. 349,
Felgrur v. Slingluff (1908) 109 Md. 480.

The deed of the Special Master could, therefore, convey to the Richfield Oil Corporation of New York, no more than was conveyed by the deed of trust of the Interocean Oil Company of Delaware, grantor and mortgagor. And this mortgage deed of trust saved and excepted from the land granted to the trustee the property of the Railroad Company which it had acquired by the deed of September 11, 1925, from the United States Asphalt and Refining Company, and similarly, in the deed of the United States Asphalt and Refining Company to the said Interocean Oil Company of Delaware bearing date October 5, 1925, which conveyed the land subsequently conveyed by the latter by deed of trust as aforesaid to the Century Trust Company; and later conveyed as aforesaid by Joseph P. Connor, Receiver and Special Master, to the Richfield Oil Corporation of New York as hereinbefore recited, there was this reservation and exception:

> "*Saving and excepting, however, from the above described land such portions* as are described in a deed of exchange and in the plat thereto attached between the United States Asphalt Refining Company and the Chesapeake and Curtis Bay Railroad Company, dated September 11, 1925" (R. 45, 55). (Italics supplied.)

In any deed of Joseph P. Connor, Receiver, and Special Master, the conveyance thereby made was subject to these exceptions of those portions of the whole tract of land which had been conveyed to the Chesapeake and Curtis Bay Railroad Company. Accordingly, in the deed of the

Special Master to the Richfield Oil Corporation of New York is found this reference to the exceptions:

> "SUBJECT also to the grant of various railroad rights of way by deed between United States Asphalt Refining Company and The Chesapeake and Curtis Bay Railroad Company, dated September 11, 1925, and recorded among the Land Records of Baltimore City in Liber S. C. L., No. 4465, folio 321, said railroad rights of way having an area of approximately Thirteen (13) acres of land, more or less" (R. 10, 55).

Since October 9, 1939, the Richfield Oil Corporation of New York held possession and title to the premises as so limited by said deed of the Special Master, and the Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company have held possession and title of the parcels described and conveyed to the Chesapeake and Curtis Bay Railroad Company by the United States Asphalt Refining Company by its deed of September 11, 1925. On November 2, 1940, the Oil Corporation late at night and early in the morning of November 3, without the knowledge, permission or consent of the Railroad Companies, proceeded to lay by its workmen a new pipe line under the railroad tracks of the Chesapeake and Curtis Bay Railroad Company for the purpose of conveying gasoline and other oil products under the tracks for more convenient delivery to a competing railway company (R. 21-22, 82-83). When the Railroad Company discovered this attempt, it interfered; stopped the work, and removed the equipment which had been put in place; and prevented the attempted installation (R. 83).

As the parties could not agree, the Richfield Oil Corporation of New York filed on November 29, 1940, in the Circuit Court No. 2 of Baltimore City, a bill for a preliminary and a permanent injunction. The relief prayed was:

"(a) That the Defendants, they and each of them, their agents and servants, may be permanently enjoined and strictly prohibited from interfering, obstructing, or molesting the Complainant, its agents and servants, in crossing or recrossing over, or in placing its pipe lines, connections, or other equipment necessary and proper to the operation and enjoyment of Complainant's property hereinabove described, across and under the right of way of Defendants located on the Complainant's said property, provided, however, that the same be performed by the Complainant in such manner as not to interfere with or interrupt the reasonable and proper use by the Defendants of said right of way for railroad purposes.

(b) That pending the determination of this cause on its merits, a preliminary injunction may be granted against the Defendants, restraining them and each of them, their agents and servants, from interfering with or obstructing the Complainant in the use of its said property as fully, and to the same extent and under the same conditions as above set forth in paragraph (a).

(c) That your Complainant may have such other and further relief as the nature of its case may require" (R. 6).

The theory upon which the bill proceeded was stated in the bill of complaint to be that the Richfield Oil Corporation of New York had acquired by its grant a fee simple title to the land under the right of way and the tracks thereon, and by virtue of its rights in and to the same, had the right to install a pipe line at the place undertaken in such a manner as would not interfere with or interrupt the reasonable and proper use by the Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company of an easement or right of way for railroad purposes or unreasonably interfere with the operation or maintenance of said railroad tracks or right of way, or

the operation of any trains, engines or cars over the same (R. 2-7).

The contention of the Railroad Companies on their answer was that previous installations had been by permission, and that the Oil Corporation had no right to make the proposed installation because the grant to the Chesapeake and Curtis Bay Railroad Company of the land described was not of a right of way but in fee, and, further, that, if it were a right of way, there was no reversionary interest in the Richfield Oil Corporation of New York in the land granted to the Chesapeake and Curtis Bay Railroad Company for its railroad purposes as such land was excluded in express terms from the conveyances under which the Richfield Oil Corporation claimed title. And, finally, even if the grants to the Railroad Company were merely of a right of way for railroad purposes the Chesapeake and Curtis Bay Railroad Company is entitled to the entire use and possession of said land, with the right to exclude the Richfield Oil Corporation and all others from entering and laying pipes thereunder (R. 19-33).

No preliminary injunction was granted, the parties took testimony and the cause was submitted. The Chancellor decreed that the Chesapeake and Curtis Bay Railroad Company was the owner in fee simple of the property located at Wagner's Point in Baltimore City, State of Maryland, and more particularly described in a deed dated September 11, 1925, between the United States Asphalt Refining Company and The Chesapeake and Curtis Bay Railroad Company. The bill of complaint was dismissed (R. 239).

The Richfield Oil Corporation took an appeal from this decree to the Court of Appeals of Maryland, which reversed the decree and remanded the case to the Circuit Court No. 2 of Baltimore City for the passage of a decree

in accordance with the views expressed in the opinion filed (R. 240).

The views of the Appellate Court are stated by it in the opinion (first appeal) to be:

(a) The Chesapeake and Curtis Bay Railroad Company did not take a fee in the parcels of land conveyed to it by the United States Asphalt Refining Company in the deed of September 11, 1925, and, considering conflicting extrinsic testimony as to the intention of the parties at the time of the execution of this deed, construed the language of the deed in connection with the extrinsic evidence, to grant an easement of rights of way for railroad purposes to the Railroad Company grantee (R. 251).

Later in the opinion, apparently in conflict with its earlier adoption of entertaining extrinsic testimony to ascertain the intention of the parties to a deed, when there is no suggestion of fraud or mistake, the Court rejects the extrinsic evidence in aid of construction and correctly holds in these terms that "the rights of the parties are determined and measured by the terms of the deed, particularly as the appellant is a stranger to this deed" (R. 251). And, on the language of the deed, holds an easement, and not a fee, was conveyed (R. 251).

(b) The appellate court, also declared that the fee is in the Richfield Oil Corporation subject to the easements of rights of way for railroad purposes in the Chesapeake and Curtis Bay Railroad Company, and in the Western Maryland Railway Company (R. 254).

(c) And, finally, the appellate court expressed its conclusion.

> "We find that the appellant, its agents and servants have the right of crossing or recrossing over, or in placing its pipe lines, connections or other equipment

necessary and proper to the operation and enjoyment of appellant's property across and under the right of way of appellees located on the property owned by the appellant in fee provided, however, that this be performed by the appellant in such manner and at such times as not to interfere with or interrupt the reasonable and proper use by the appellees of said rights of way for railroad purposes" (R. 255).

Richfield Oil Corporation of New York vs. The Chesapeake & Curtis Bay Railroad Company, et al., No. 38, April Term, 1941, filed June 10, 1941. 20 A. (2d) 581.

Upon the filing of the opinion, the Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company prepared and filed in the Court of Appeals of Maryland a motion for re-argument (R. 243).

The Court of Appeals overruled the motion for re-argument and on July 12, 1941, the opinion and mandate from the Court of Appeals of Maryland were received and filed in the Circuit Court No. 2 of Baltimore City. By this mandate the Chancellor was directed and authorized to render a decree in accordance with the views expressed by the Court of Appeals in its opinion in the case (R. 242, 243).

Whereupon the Richfield Oil Corporation presented to the Circuit Court No. 2 of Baltimore City a form of decree, which was objected to but signed by the Court, which held the same for further consideration and until and after certain counsel of the defendant railway companies, who were then absent, would have an opportunity to appear and be heard at a later day to be fixed; and thereafter, and before said decree became effective, the said The Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company filed with said Court objections in writing to the signing and filing of said proposed decree, and

excepted to the same, which said provisional decree and objections provided:

"1. That The Chesapeake & Curtis Bay Railroad Company is the owner of an easement of the rights of way for railroad purposes, more particularly described in a deed dated September 11th, 1925, between the United States Asphalt Refining Company and The Chesapeake & Curtis Bay Railroad Company and recorded among the Land Records of Baltimore City in Liber S. C. L., No. 4465, folio 321, and that Richfield Oil Corporation of New York is the owner of the fee underlying the rights of way described in said deed dated September 11, 1925.

2. That it is further ORDERED, ADJUDGED, and DECREED that Richfield Oil Corporation of New York, its agents and servants have the right of crossing or recrossing over, or in placing its pipe lines, connections or other equipment necessary and proper to the operation and enjoyment of its property across and under the rights of way of defendants located on the property owned by Richfield Oil Corporation of New York in fee, and that the defendants herein The Chesapeake & Curtis Bay Railroad Company and Western Maryland Railway Company, they and each of them, their agents and servants, be and they are hereby permanently enjoined and strictly prohibited from interfering with, obstructing or molesting Richfield Oil Corporation of New York, its agents and servants, in crossing or recrossing over, or in placing its pipe lines, connections, or other equipment necessary and proper to the operation and enjoyment of its property across and under the rights of way of defendant, The Chesapeake & Curtis Bay Railroad Company, located on said property of Richfield Oil Corporation of New York, provided, however, that the same be performed by Richfield Oil Corporation of New York, its agents and servants, in such manner and at such times as not to interfere with or interrupt the reasonable and proper use by the defendants of said rights of way for railroad purposes" (R. 256-257).

The OBJECTIONS AND EXCEPTIONS to the decree were:

"First: That the said proposed decree is not in accordance with opinion of the Court of Appeals; and

Second: That the said proposed decree is not addressed and related to the pleadings and issues of said cause; and

Third: That the said proposed decree is general and not particular in its scope and effect, and is not within the purview of the decision of the Court of Appeals and is in excess of the proper relief to be granted by virtue of and pursuant to said decision; and

Fourth: That the said proposed decree is in violation and denial of the constitutional rights and protection of your defendants and appellees under the constitution of the United States, as affirmatively appears from the pleadings and testimony and procedure of record in this cause, in that:

(a) The proposed final decree deprives the defendants and each of them of the due and equal protection of the law; and

(b) The proposed final decree is, and will constitute, an improper and unlawful interference with interstate commerce, and will obstruct, hinder, interfere, delay and prevent the said defendants, and each of them, in the safe, free and unobstructed carriage of passengers and freight and operation of its railways while engaged in interstate commerce; and

(c) The proposed final decree is wholly unsupported either by the evidence of record or any reasonable inference therefrom; and

(d) The proposed final decree deprives the defendants and each of them of their and each of their property without due process of law; and

(e) The said final decree appropriates and subjects the real property of the defendants and each of them to the use and enjoyment of the plaintiff which is without right, title or interest in contract or grant, or otherwise, to such use and enjoyment.

> And the said defendants and appellees further show and state that the above federal questions, and every of them, were and was presented for decision by the said Court of Appeals of Maryland and for final decree on reversal and remand to your Honorable Court, and are and is necessary for the determination on remand by this Honorable Court; and that neither the Court of Appeals of Maryland nor this Honorable Court can render the proposed final decree without having decided, or deciding, the above specified federal questions, and having decided, or deciding such federal constitutional questions adversely to and in denial of the contutional rights, privileges and immunities of the said defendants, and each of them (R. 261).
>
> * * *

After a hearing by the Court, the objections to the proposed decree were rejected and the decree was passed and filed (R. 270).

The defendants excepted to this action and an appeal from the decree of the Circuit Court No. 2 of Baltimore City, dated the fifteenth of July, 1941, was taken by the defendants on August 22, 1941 (R. 271), and on this appeal the appellants presented two grounds. The first was that the only issue at the trial of the cause was whether the Richfield Oil Corporation had the right to lay an underground pipe line at the proposed place near Northbridge Avenue, and that the form of the decree was general, instead of particular, and, therefore, bad since the general terms of the relief may embrace, but not enlarge, the relief warranted by the averment of facts made in the charging part of the bill of complaint.

The second ground urged was that there can be no concurrent use or occupancy of the right of way of a railroad while in actual use by the carrier in the operation of its enterprise unless with its authorized consent. It would be

the taking of private property without the owner's consent for the private use of another, which is not due process of law, but which is a violation of the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals of Maryland, on January 13, 1942, filed its opinion sustaining the second decree of the Circuit Court No. 2 of Baltimore City, stating:

> "It is, therefore, unmistakable that the issue raised by the bill and answer was whether the oil corporation had the right to cross and recross over, or to place its pipe lines across and under, the railroad rights of way, not only at the specific spot where the trouble arose, but at any proper place in the described tract of land."
>
> *Chesapeake and Curtis Bay Railroad Company, et al., v. Richfield Oil Corporation of New York,* No. 73 October Term, 1941, decided January 13, 1942. 23 Atlantic Reporter (2d) pp. 677-679.

On February 9, 1942, a final decree was entered by the Court of Appeals (R. 275) for the review of which this petition is presented.

While the Court of Appeals did not mention in its opinion (second appeal) the constitutional questions presented, they were considered and decided, as appears from the certificate of the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland as follows:

> "CERTIFICATE
>
> I, Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland, do hereby certify that in the appeals in the above entitled case were involved the questions
>
> (1) Whether the decrees passed deprived the defendants and each of them of the due and equal protection of the law; and

(2) Whether the decrees passed deprived the defendants and each of them of their and each of their property without due process of law; and

(3) Whether the final decree is and does constitute an improper and unlawful interference with interstate commerce, and will obstruct, hinder, interfere, delay and prevent the defendants and each of them in the safe, free and unobstructed carriage of passengers and freight and the operation of their railways while engaged in interstate commerce; and

(4) Whether the final decree appropriates and subjects the real property of the defendants and each of them to the use and enjoyment of the plaintiff which is without right, title or interest in contract or grant or otherwise to such use and enjoyment;

And that the Court rejected said contentions of the defendants, and decided to the contrary, and affirmed the said decree.

Further, that the Decree of this Court, dated February 9, 1942, is a final Decree of the highest Court of the State of Maryland in the above cause.

(s) CARROLL T. BOND,
Chief Judge of the Court of Appeals of the State of Maryland." (R. 276).

April 1, 1942.

Title 28 U. S. C. A., sec. 344, n. 49, n. 50.

II.

JURISDICTION.

Jurisdiction of this Honorable Court is invoked under Sec. 237b of the Judicial Code as amended by the Acts of February 13, 1925, Ch. 229; Sec. 1, 43 Stat. Sec. 344, of Title 28 U. S. C. A. in that a final judgment or decree has been rendered by the highest court of the State of Maryland where a right or privilege was specially set up or claimed by the Petitioners here under the Fourteenth

Amendment to the Constitution of the United States and such judgment or decree arbitrarily and erroneously denied to the Petitioners such a right or privilege.

Fleming v. Fleming, 264 U. S. 29, 31;
Tidal Oil Co. v. Flanagan, 263 U. S. 444;
Godchaux Co. v. Estopinal, 251 U. S. 179.

III.

QUESTION PRESENTED.

Does the final decree of the Court of Appeals of Maryland passed on February 9, 1942, in the appeal of the Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company against the Richfield Oil Corporation of New York affirming and adjudging that the Richfield Oil Corporation of New York (a) is the owner in fee of certain land over which the Railroad Companies has rights of way for railroad purposes, and (b) as such owner the Oil Corporation has the right, without compensation to the Railroad Companies, to cross and recross over, or to place its oil pipe lines across and under, the rights of way of the said Railroad Companies as long as such acts are performed in such manner and at such times as not to interfere with or interrupt the reasonable and proper use of the rights of way for railroad purposes, deprive the Railroad Companies or either of them of their or its respective property without due process of law?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Court of Appeals of Maryland *erred in finding and holding* that the use on or below the surface of the Railroad Companies' real property by the Richfield Oil Corporation for the purpose of crossing this property at its pleasure and when and where and how it chooses, by

laying and constructing oil pipe lines for the carriage and delivery between separate portions of the Oil Corporation's land, of its crude and refined oil or other products, *is not a taking* of the property of the Railroad Companies without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

2. The Court of Appeals of Maryland *erred in finding and holding* that the Richfield Oil Corporation is the owner in fee simple of that portion of land, upon which the Railroad Companies operate their railroad through and separating the premises of the Richfield Oil Corporation, and that, subject to such railroad uses, the Richfield Oil Corporation may, at its pleasure, lay and construct for its industrial purposes or otherwise, upon, over and under the surface, oil pipe lines across the land occupied for and devoted to the uses of the Railroad Companies; and *that in so finding and holding* the Railroad Companies were thereby deprived of their property without due process of law and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

3. That in finding and holding that the Richfield Oil Corporation is the owner in fee simple of that portion of the land upon which the Railroad Companies operate their railroad, the Court arbitrarily and capriciously construed the "saving and excepting" clauses contained in the Deed (R. 38, 55) of the Asphalt Company to the Interocean Oil Company of Delaware and in the Deed of the Interocean Oil Company of Delaware to the Century Trust Company (R. 39, 55) which clauses by their express, clear, unequivical and precise terms save and except from such conveyances said land and in so construing said "saving and excepting" clauses deprived the Railroad Companies of their property without due process of law contrary to the Fourteenth Amendment.

4. On September 11, 1925, the date of the conveyance by the Asphalt Company to the Chesapeake & Curtis Bay Railroad Company, the rights of way in use for railroad purposes granted and conveyed thereby to the Chesapeake & Curtis Bay Railroad Company were exclusive under the law of the State of Maryland then effective by virtue of the uniform decisions of the Court of Appeals of the State of Maryland, and the Court of Appeals in deciding and holding, for the first time, in the instant case, that a right of way in use for railroad purposes is not an exclusive right of way, impaired the rights granted and conveyed by said deed to the Chesapeake & Curtis Bay Railroad Company and thereby deprived the Railroad Companies of their property without due process of law contrary to the Fourteenth Amendment.

5. That in finding and holding that the Richfield Oil Corporation is the owner in fee simple of that portion of land upon which the Railroad Companies operate their railroad through the premises of the Richfield Oil Corporation, and that, subject to such railroad uses, the Richfield Oil Corporation may, at its pleasure and convenience, enter upon and lay and construct for its industrial purposes or otherwise, upon, over or under the surface, oil pipe lines across the land occupied for and devoted to the uses of the Railroad Companies, the decree of the Court of Appeals of Maryland is *in violation of* the provisions of the Fourteenth Amendment of the Constitution of the United States and does, and will, authorize and permit an *improper and unlawful interference with interstate commerce*, and will obstruct, hinder, interfere, delay and prevent the said Railroad Companies and each of them, in the safe, free and unobstructed carriage of passengers and freight, and the operation of its railways while engaged in interstate commerce.

6. The decision and final decree of the Court of Appeals of Maryland that the right of the Richfield Oil Corporation, its agents and servants, of crossing or recrossing over, or in placing its pipe lines, connections or other equipment necessary and proper to the operation and enjoyment of the Oil Corporation's property across and under the right of way of the Railroad Companies, provided that the right be performed by the Oil Company in such manner and at such times as not to interfere with or interrupt the reasonable and proper use by the Railroad Companies of said right of way for railroad purposes is not in violation of the clause of the Fourteenth Amendment to the Constitution of the United States which protects the Railroad Company from being deprived of their property without due process of law *is a decision and decree in conflict with* the applicable decisions of this Honorable Court.

7. The determination of the Court of Appeals of Maryland not only violates the guaranties of the Federal Constitution with respect to these Petitioners at the location of the pending controversy, but, if it should not be found to transgress and nullify the protective provisions of the Fourteenth Amendment to the Constitution of the United States, the effect of this determination will be operative along the length of the interstate railway lines of these Petitioners and other public service corporations in the confiscation of long established and enjoyed user of the rights of way of public service carriers of every kind. The gravity of the circumstances and the necessity for resort to the highest Constitutional authority for the solution of the problems of the instant case make for their consideration under the writ of certiorari.

Your Petitioners, in the brief with this petition, will enlarge upon the aforegoing reasons for the allowance of the writ of certiorari.

Wherefore, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of Maryland commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all the proceedings in the above entitled case, and that the said judgment and decree of the Court of Appeals of Maryland may be reversed by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And as in duty bound your Petitioners will ever pray, etc.

EUGENE S. WILLIAMS,

WILLIAM R. SEMANS,

F. NEAL PARKE,
Counsel for Petitioners.

MONTGOMERY, MCCRACKEN,
WALKER & RHOADS,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

REPORT OF OPINION OF THE COURT OF APPEALS OF MARYLAND.

The opinion and decision of the Court of Appeals of Maryland involved in this cause is reported in 23 Atlantic Reporter, Second Series, page 677, and also appears in the record at pages 272 to 277.

II.

JURISDICTION.

1. Jurisdiction of this Honorable Court is invoked under Section 237 (b) of the *Judicial Code* as amended by the Act of February 13, 1925, ch. 229, Section 1; 43 Stat. 937; Section 344 of Title 28 U. S. C. A.

2. The judgment of the Court of Appeals of Maryland, which affirmed the decree of the trial court, was entered on February 9, 1942 (R. 277).

3. A final judgment or decree has been rendered by the highest court of the State of Maryland wherein a right or privilege was specially set up or claimed by the Petitioners under the Fourteenth Amendment to the Constitution of the United States, and such judgment or decree erroneously denied to the Petitioners such a right or privilege (R. 275-277).

Fleming v. Fleming, 264 U. S. 29, 31;
Tidal Oil Co. v. Flanagan, 263 U. S. 444;
Godchaux Co. v. Estopinal, 251 U. S. 179.

4. One of the grounds of the Petitioners' complaint in the Circuit Court No. 2 of Baltimore City (R. 258-262) and

one of the errors relied upon in the Court of Appeals of Maryland (R. 276) was that the judgment or decree rendered by the Circuit Court No. 2 of Baltimore City deprived the Petitioners and each of them of their and each of their property without due process of law (R. 276) And a second and a third subsidiary ground were that such judgment and decree appropriated and subjected the property of the defendants and of each of them to a use and enjoyment of that property which (a) was without license, or right by contract, title or interest and (b) constituted an unlawful interference with the safe, free and unobstructed carriage of freight and passengers in interstate commerce (R. 276).

By affirming the judgment or decree of the Circuit Court No. 2 of Baltimore City, the Court of Appeals of Maryland decided that this decree or judgment did not deprive the Petitioners of their property without due process of law within the meaning and protection of the Fourteenth Amendment to the Constitution of the United States.

There were two appeals in this cause. The chancellor first decreed on the proof that the fee simple title to the railroad property was in the Railroad, and dismissed the Oil Company's bill of complaint (R. 240). On this appeal, the Federal question did not arise. The appellate court, reversed the decree and remanded the cause to the Circuit Court No. 2 of Baltimore City for a decree to be passed by that tribunal in accordance with the views expressed in the opinion (R. 256). Hence this mandate was not a final appeal. When the Oil Company presented the form of a decree the Petitioners here objected to it as not being in conformity with the decision and as being in violation of the terms of the Fourteenth Amendment (R. 258-262).

The chancellor overruled these objections and the Petitioners appealed and, therefore, there was no final decree of a court of final jurisdiction for review on a writ of certiorari until the decree or judgment of the Court of Appeals affirming the decree of the chancellor (R. 275).

5. It is submitted that the jurisdiction of this Honorable Court to review this case by certiorari is sustained by the principle enforced in *Missouri Pacific Railway Company v. State of Nebraska ex rel. Board of Transportation of the State of Nebraska,* 164 U. S. 404, 417, 41 L. Ed., 489, 495, where it is said:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States".
>
> *Chicago, etc., R. Co. v. United States,* 284 U. S. 80, 96, 97, 76, L. Ed. 177, 186.

The decision in *Erie Railroad Company v. Tompkins,* 304 U. S., 64, 82 L. ed. 1188, it is respectfully submitted, is not in conflict with this principle, and, on the facts is not here applicable. By that decision the doctrine of *Swift v. Tyson,* 16 Pet. 1, 10 L. ed. 865, was overruled and it was held that the substantive rule of law, prevailing in courts of the state in which the cause of action arose should be enforced in Federal courts, whether the rule be local or general in its nature or be a part of commercial law or of the law of torts. Nevertheless, the justiciable matters which are governed by the Constitution of the United States, its treaties and the federal statutes remain unaffected and abide with the federal judiciary (Federal Judiciary Act of September 24, 1789, chap. 20, sec. 34; 28 U. S. C. A. sec. 725, pp. 78, 79, 80).

The Federal constitutional question in issue was presented, argued and considered in the Court of Appeals of Maryland in the instant case (R. 276). And, so, the decision of *Erie Railroad Company v. Tompkins, supra,* is not here in point. The doctrine of that decision that the state decisions in which the cause of action arose are to govern in Federal Courts is confined to those cases in which non-federal issues are before the Federal courts for adjudication. 114 *A. L. R.* 1500; 54 *Harvard Law Review,* 1380.

Even in those instances where the construction of a state statute or a decision of the general law prevailing in a state is made by a court of last resort of that state, a Federal court is not thereby concluded when the question presented is a Federal issue in respect of whether a party is thereby deprived of rights secured by the Federal Constitution. Form gives way to substance and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state. *Hanover Fire Insurance Company v. Carr,* 272 U. S., 494, 509, 510; 71 L. ed. 372, 380. *Truax v. Corrigan,* 257 U. S. 312, 66 L. ed. 254. *St. Louis Cotton Compress Co. v. Arkansas,* 260 U. S. 346, 67 L. ed. 297.

In the determination whether there is an infringement of the Federal Constitution, the prerogative of a review and independent judgment in so grave and fundamental a matter is not lost to the Federal court by the decision of a state court. The prerogative is and must be retained for the declaration, preservation and enforcement of the guaranties under the Fourteenth Amendment to the Federal Constitution whenever the exigency arises.

III.

STATEMENT OF THE CASE.

PLEADING AND PROCEDURE.

The Richfield Oil Corporation of New York, respondent, brought on November 29, 1940, in the Circuit Court No. 2 of Baltimore City, a suit in equity against the Petitioners, the Chesapeake and Curtis Bay Railroad Company and The Western Maryland Railway Company, asking for a temporary and permanent injunction against the Petitioners, and for general relief (R. 1-19).

The theory upon which the bill was drawn was that the Richfield Oil Corporation of New York had acquired on October 6, 1939, by grant, a fee simple title to land over which the petitioners operated their railroad and that by virtue of such fee simple title the Respondent had the right to install a certain pipe line in such a manner as would not interfere with or interrupt the reasonable and proper use by the Respondents of their easement or right of way for railroad purposes or unreasonably interfere with the operation or maintenance of said railroad tracks or right of way or the operation of any trains, engines or cars over the same. The bill of complaint further alleged that in the exercise of this right the Respondent, on or about November 2, 1940, entered upon the premises of the Petitioners and placed certain sleeves and pipes necessary for the transportation of its petroleum products from one part of its property and under the tracks and rights of way of the Petitioners to other locations on the Respondent's property. This installation was made south of a public highway through Respondent's property, known as Northbridge Avenue or as it appears on the plats variously as "North Avenue" and "Wagner Point Road" (R. 2, 3, 4, Plats—R. 10A, 34A, 36A, 55).

While the Respondent was in the course of this installation, the bill of complaint charges that the Petitioners caused their agents and servants to trespass on Respondent's property and, notwithstanding Respondent's resistance to succeed in partly destroying the sleeves and pipes (R. 4). The attempt and its resistance were the occasion for the filing of the bill of complaint, and the seeking of relief by way of a temporary and permanent injunction (R. 6).

The specific relief prayed was:

> "(a) That the Defendants, they and each of them, their agents and servants, may be permanently enjoined and strictly prohibited from interfering, obstructing, or molesting the Complainant, its agents and servants, in crossing or recrossing over, or in placing its pipe lines, connections, or other equipment necessary and proper to the operation and enjoyment of Complainant's property hereinabove described, across and under the right of way of Defendants located on the Complainant's said property provided, however, that the same be performed by the Complainant in such manner as not to interfere with or interrupt the reasonable and proper use by the Defendants of said right of way for railroad purposes.
>
> (b) That pending the determination of this cause on its merits, a preliminary injunction may be granted against the Defendants, restraining them and each of them, their agents and servants, from interfering with or obstructing the Complainant in the use of its said property as fully, and to the same extent and under the same conditions as above set forth in paragraph (a).
>
> (c) That your Complainant may have such other and further relief as the nature of its case may require." (R. 6).

The Petitioners answered jointly and severally (R. 19). The titles of the Respondent and these Petitioners and the grants under which they held were carefully set forth and supported by the documents of title (R. 20, 23-27; 34, 34A (plat) 35, 36, 36A (plat) 37-46) and by correspondence of 1926, between J. Cookman Boyd, Esq., General Counsel of the United States Asphalt Refining Company and officials of the Petitioners (R. 28-29, 29-31, 47-52, 53-54, 137, 210, 211). The Petitioners set forth in their answer that previous installations had been by permission, and that the Oil Corporation had no right to make the proposed installation because the grant to the Chesapeake and Curtis Bay Railroad Company of the land described was not of a right of way but in fee, and, further, that, if it were a right of way, there was no reversion of the land granted to the Chesapeake and Curtis Bay Railroad Company, as such land was excluded in terms from the grants under which the Richfield Oil Corporation claimed title. And, finally, even if the grants to the Railroad Company were merely of a right of way for railroad purposes the Chesapeake and Curtis Bay Railroad Company is entitled to the exclusive use and possession of said land, with the right to exclude the Richfield Oil Corporation and all others from entering thereon and laying pipes thereunder (R. 22, 23, 27, 32, 33).

No preliminary injunction was granted, the parties took testimony and the cause was submitted. The Chancellor decreed that the Chesapeake and Curtis Bay Railroad Company is the owner in fee simple of the property located at Wagner's Point in Baltimore City, State of Maryland, and more particularly described in a deed dated September 11, 1925, between The United States Asphalt Refining Company and The Chesapeake and Curtis Bay Railroad Company. The bill of complaint was dismissed (R. 239-240).

The Richfield Oil Corporation took an appeal from this decree to the Court of Appeals of Maryland, which reversed the decree and remanded the case to the Circuit Court No. 2 of Baltimore City for the passage of a decree in accordance with the views expressed in the opinion filed (R. 243-256).

FIRST OPINION OF APPELLATE COURT AND SUBSEQUENT PROCEDURE.

The views of the Appellate Court are stated by it in the opinion (first appeal) to be:

(a) The Chesapeake and Curtis Bay Railroad Company did not take a fee in the parcels of land conveyed to it by the United States Asphalt Refining Company in the deed of September 11, 1925, and, considering conflicting extrinsic testimony as to the intention of the parties at the time of the execution of this deed, construed the language of the deed, in connection with the extrinsic evidence to grant an easement of rights of way for railroad purposes to the Railroad Company, grantee (R. 250-251).

Later on in the opinion,—apparently in conflict with its earlier adoption of extrinsic testimony to ascertain the intention of the parties to a deed, when there is no suggestion of fraud or mistake,—the Court rejects the extrinsic evidence in aid of construction and correctly holds in these terms that "The rights of the parties are determined and measured by the terms of the deed, particularly as the appellant is a stranger to this deed." (R. 251-252) And, on the language of the deed, holds an easement, and not a fee, was conveyed (R. 253).

(b) The appellate court, also declared that the fee is in the Richfield Oil Corporation subject to the easements of

rights of way for railroad purposes in the Chesapeake and Curtis Bay Railroad Company, and in the Western Maryland Railway Company (R. 254).

(c) And, finally, the appellate court expressed its conclusion:

> "We find that the appellant, its agents and servants have the right of crossing or recrossing over, or in placing its pipe lines, connections or other equipment necessary and proper to the operation and enjoyment of appellant's property across and under the right of way of appellees located on the property owned by the appellant in fee provided, however, that this be performed by the appellant in such manner and at such times as not to interfere with or interrupt the reasonable and proper use by the appellees of said rights of way for railroad purposes."
>
> *Richfield Oil Corporation of New York vs. The Chesapeake & Curtis Bay Railroad Company, et al.*, No. 38, April Term, 1941, filed June 10, 1941. 20 A. (2d) 581, 589 (R. 255).

Upon the filing of the opinion, the Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company prepared and filed in the Court of Appeals of Maryland a motion for re-argument, which was overruled.

On July 12, 1941, the opinion and mandate from the Court of Appeals of Maryland were received and filed in the Circuit Court No. 2 of Baltimore City. By this mandate the Chancellor was directed and authorized to render a decree in accordance with the views expressed by the Court of Appeals in its opinion in the case (R. 256).

DECREE OF TRIAL COURT AFTER FIRST APPEAL.

Whereupon the Richfield Oil Corporation presented to the Circuit Court No. 2 of Baltimore City a form of decree, which provided:

"1. That The Chesapeake & Curtis Bay Railroad Company is the owner of an easement of the rights of way for railroad purposes, more particularly described in a deed dated September 11th, 1925, between the United States Asphalt Refining Company and The Chesapeake and Curtis Bay Railroad Company and recorded among the Land Records of Baltimore City in Liber S. C. L., No. 4465, folio 321, and that Richfield Oil Corporation of New York is the owner of the fee underlying the rights of way described in said deed dated September 11, 1925.

2. That it is further ORDERED, ADJUDGED, and DECREED that Richfield Oil Corporation of New York, its agents and servants have the right of crossing or recrossing over, or in placing its pipe lines, connections or other equipment necessary and proper to the operation and enjoyment of its property across and under the rights of way of defendants located on the property owned by Richfield Oil Corporation of New York in fee, and that the defendants herein The Chesapeake & Curtis Bay Railroad Company and Western Maryland Railway Company, they and each of them, their agents and servants, be and they are hereby permanently enjoined and strictly prohibited from interfering with, obstructing or molesting Richfield Oil Corporation of New York, its agents and servants, in crossing or recrossing over, or in placing its pipe lines, connections, or other equipment necessary and proper to the operation and enjoyment of its property across and under the rights of way of defendant, The Chesapeake & Curtis Bay Railroad Company, located on said property of Richfield Oil Corporation of New York, provided, however, that the same be performed by Richfield Oil Corporation of New York, its agents and servants, in such manner and at such times as not to

interfere with or interrupt the reasonable and proper use by the defendants of said rights of way for railroad purposes" (R. 259-261).

The Petitioners objected to the passage and filing of said decree (R. 261, 262).

After a hearing before the Court, the objections to the proposed decree were rejected and the decree as signed was passed and filed (R. 262, 270).

SECOND APPEAL.

The defendants excepted to this action and an appeal from the decree of the Circuit Court No. 2 of Baltimore City, dated the fifteenth of July, 1941, was taken by the defendants on August 22, 1941 (R. 242), and on this appeal the appellants presented two grounds. The first was that the only issue at the trial of the cause was whether the Richfield Oil Corporation had the right to lay an underground pipe line at the proposed place near Northbridge Avenue, and that the form of the decree was general, instead of particular, and, therefore, bad since the general terms of the relief may embrace, but not enlarge, the relief warranted by the averment of facts made in the charging part of the bill of complaint.

The second ground urged was that there can be no concurrent use or occupancy of the right of way of a railroad while in actual use by the carrier in the operation of its enterprise unless with its authorized consent. It would be the taking of private property without the owner's consent for the private use of another, which is not due process of law, but which is a violation of the Fourteenth Amendment to the Constitution of the United States (R. 276).

The Court of Appeals of Maryland on January 13, 1942, affirmed the second decree of the Circuit Court No. 2 of Baltimore City, stating:

> "It is, therefore, unmistakable that the issue raised by the bill and answer was whether the oil corporation had the right to cross and recross over, or to place its pipe lines across and under, the railroad rights of way, not only at the specific spot where the trouble arose, but at any proper place in the described tract of land" (R. 274).
>
> *Chesapeake and Curtis Bay Railroad Company, et al., v. Richfield Oil Corporation of New York*, No. 73, October Term, 1941, decided January 13, 1942. 23 A. (2d) pp. 677-679 (R. 272).

While the Court of Appeals did not mention in its opinion (second appeal) the constitutional questions presented (R. 272-275), they were considered and decided, as appears from the certificate of the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland (R. 276).

Title 28, U. S. C. A., sec. 344, n. 49, n. 50.

IV.

SPECIFICATIONS OF ERROR.

1. The Court of Appeals of Maryland erred in finding and holding that the Richfield Oil Corporation is the owner in fee simple of that portion of the land upon which the Railroad Companies operate their railroad under grant from The United States Asphalt Refining Company to The Chesapeake and Curtis Bay Railroad Company, bearing date of September 11th, 1925, and that in so holding and deciding the Railroad Companies were and are deprived of their property without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States.

2. The Court of Appeals of Maryland erred in refusing to find and to hold in the instant case that the rule of real property, which before and at the time of the conveyance on September 11, 1925, by The United States Asphalt Refining Company to The Chesapeake and Curtis Bay Railroad Company of certain real property for use for railroad purposes, and thereafter continuously until the decree in the instant case, was that the possession and enjoyment of the real property in use for railroad purposes was exclusive, and in so refusing and so finding and holding The Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railroad Company were and are thereby deprived of their property rights without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

3. The Court of Appeals of Maryland erred in finding and holding that the use on or below the surface of the Railroad Companies' real property by the Richfield Oil Corporation for the purpose of crossing this property in use for railroad purposes at its pleasure and when and where and how it chooses, by laying and constructing oil pipe lines for the carriage and delivery between separate portions of the Oil Corporation's land, of its crude and refined oil or other products, is not a taking of the property of the Railroad Companies without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

4. The Court of Appeals of Maryland erred in finding and holding that the Richfield Oil Corporation is the owner in fee simple of that portion of land, upon which the Railroad Companies operate their railroad through and separating the premises of the Richfield Oil Corporation, and that, subject to such railroad uses, the Richfield Oil Cor-

poration may, at its pleasure, lay and construct for its industrial purposes or otherwise, upon, over and under the surface, oil pipe lines across the land occupied for and devoted to the uses of the Railroad Companies; and that in so finding and holding the Railroad Companies were deprived of their property without due process of law and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

5. That in finding and holding that the Richfield Oil Corporation is the owner in fee simple of that portion of land upon which the Railroad Companies operate their railroad through the premises of the Richfield Oil Corporation, and that, subject to such railroad uses, the Richfield Oil Corporation may, at its pleasure and convenience, enter upon and lay and construct for its industrial purposes or otherwise, upon, over or under the surface, oil pipe lines across the land occupied for and devoted to the uses of the Railroad Companies, the decree of the Court of Appeals of Maryland is in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States and does, and will, authorize and permit an improper and unlawful interference with interstate commerce, and will obstruct, hinder, interfere, delay and prevent the said Railroad Companies and each of them, in the safe, free and unobstructed carriage of passengers and freight, and the operation of its railways while engaged in interstate commerce.

V.

ARGUMENT.

THE QUESTIONED TITLE OF RICHFIELD OIL CORPORATION.

The Court of Appeals decided three issues:

First. It decided that the deed of the United States Asphalt Refining Company to the Chesapeake and Curtis Bay Railroad Company under date of September 11, 1925,

did not convey in fee simple the nine parcels of land in said deed separately and fully described (R. 11-19, 55), but that said nine parcels of land were granted to the Chesapeake and Curtis Bay Railroad Company so long as the said nine parcels of land were used for railroad purposes. The effect of this construction was to leave in the United States Asphalt Refining Company a reversionary interest when the nine parcels should cease to be used for railroad purposes by the said Railroad Company and its successors and assignee.

In reaching this result the court permitted itself to approve the admission of extrinsic testimony to be received and considered in determining the intention of the parties with reference to the quantum of the estate conveyed. What was said in reference to the admissibility of this extrinsic testimony in respect of the intention of the parties to the deed must be taken as *dicta*. The court, finally, construed the instrument from its terms, and so no anomalous doctrine may be said to have been adopted (R. 251-252).

No constitutional question is made on this construction.

Second. The effect of this grant to the Railroad Company, its successors and assign, of an estate or interest less than one in fee simple in the nine described parcels of land by the owner in severalty in fee simple, left that owner with two estates, namely, an estate in fee simple, in all its land, with the exception of nine parcels carved therefrom in which it had a reversionary interest or estate, which could not vest in possession and enjoyment so long as the parcels should continue to be used for the railroad purposes of their grantee, its successors and assigns. Thus an estate in severalty became divided into three separate and legally distinct estates and interests of a different nature, that is, the Asphalt Refining Company had an es-

tate *in fee simple and in severalty* in all its land, with the exception of the nine lots of land granted to the Railroad Company for its railroad uses and purposes. In these nine described lots there were two estates or interests: (first) that of the grantee, which was the right or interest of possession, user, and enjoyment of those nine parcels of land by the said Railroad Company, its successors and assigns, so long as the said Railroad Company, its successors and assigns, should use said lots for its railroad purposes; and (second) that of the grantor, which was the right of reverter to the grantor, its successors and assigns, should the Railroad Company cease to use said property for railroad purposes. *Tiffany on Real Property* (2nd ed.) secs. 93, 132; *Reed v. Stouffer*, 56 Md. 236; *First Universalist Soc. v. Boland*, 155 Mass. 171, 29 N. E. 524; *Board of Chosen Freeholders v. Buck*, 79 N. J. Eq. 472; 82 Atl. 418; *Leonard v. Burr*, 18 N. Y. 96; *Slegal v. Lauer*, 148 Pa. St. 236, 23 Atl. 996; *Gray*, Perpetuities, secs. 31-40. The interest so acquired has been variously called an easement, a base qualified or determinable fee, and a servitude, but its important and distinguishing quality is the right conferred of immediate and continuous possession and enjoyment. The nature and extent of that user will be presently considered.

The question for immediate discussion on this brief is whether the reversionary interest of the Asphalt Refining Company has been granted or assigned.

The reversionary interest of the Asphalt Refining Company arose on September 11, 1925 (R. 11). At no time has the Asphalt Refining Company in terms conveyed this reversionary interest. Its only later deed of record is the one to the Interocean Oil Company of Delaware bearing date October 5, 1925 (R. 38-39). It is submitted, that there is no grant in that deed of such reversionary interest, nor any words which, by necessary inference, are suffi-

cient to establish an intention of the granter to convey this reversionary interest, which could never ripen into possession and immediate enjoyment except upon the remote possibility of the cessation of railway user of the nine parcels of land by the Chesapeake and Curtis Bay Railroad Company, its successors and assigns. The language of the deed prevents such a construction.

The granting clause conveyed in fee simple, four contiguous parcels of land, which are described, and contain in the aggregate about 107.72 acres. This reservation is then made:

> "Saving and excepting, however, from the above described land such portions as is (*sic*) described and conveyed to the Chesapeake and Curtis Bay Railroad Company by and in a deed of exchange and in the annexed hereto" (plat thereto) "made between the said United States Asphalt Refining Company and the Chesapeake and Curtis Bay Railroad Company, dated September 11, 1925" (R. 38-39; 11-19, 55).

Plainly and unequivocally from the conveyance of the four parcels of described land there is a reservation of certain "land". No doubt is left as to the land saved and excepted. It is "such portions" of the land "described and conveyed" in a specified deed to the Chesapeake and Curtis Bay Railroad Company of September 11th, 1925. In that deed, the only portions of land so conveyed are the nine parcels of land separately and completely bounded and described in that deed. Consequently, these are the portions of land saved and excepted from the grant to the Interocean Oil Company. What the grantor specifically excepted from the grant may not be held by judicial interpolation to be embraced. The express provision precludes implication. To decide what is specifically excluded to be included is to defeat intention by an arbitrary fiat.

Furthermore, the granting clause of the deed in question is of the four lots described *"in fee simple"*, saving and excepting therefrom such portions of these four lots as are described in the deed to the Railroad Company (R. 38). In the habendum clause the grantee, its successors and assigns, are to have and to hold the land intended to be conveyed *"in fee simple"* (R. 39). The United States Asphalt Refining Company did not hold at the time of this conveyance to the Interocean Oil Company, an estate "in fee simple", in the nine parcels of land described and conveyed in the deed of the Refining Company to the Railroad Company. As has been seen the Refining Company held only a reversionary interest in the nine parcels. It could not convey a fee simple estate when its interest mounted to nothing more than a reversionary interest or contingent right of re-entry.

It is submitted that the error of the appellate court is in defining "portions" to refer to an *incorporeal* right instead of "the above described land", a *corporeal hereditament* (R. 253-54).

No matter from what angle it be considered, the deed speaks clearly to the conclusion that the reversionary interest of the Refining Company in the nine parcels of land mentioned in the deed to the Railroad is excepted from the conveyance to the Interocean Oil Company (R. 38-39), and, therefore, neither it nor its successor in estate, the Richfield Oil Corporation, has any interest, title or estate in the reversion of the land or railroad premises now held by the Petitioners.

The reversionary interest in the land now used and possessed by the Petitioners for their railway purposes and enjoyment is in the United States Asphalt Company. The bestowal of this interest by decree of the Court of Appeals

of Maryland upon the Richfield Oil Corporation is in substance and effect an arbitrary and capricious act which affords no basis for a decree of that court which authorizes the Richfield Oil Corporation to enter upon and use the property of the Petitioners for the Oil Corporation's private business purposes. The result is an appropriation of the Respondent's property in violation of the guaranties of the Fourteenth Amendment to the Constitution of the United States.

It is respectfully urged that it becomes the duty of the United States Supreme Court to review and correct the error of a state court in resting its decision denying asserted federal rights upon a basis of fact or of construction which has no support in the record.

Railroad Commission v. Eastern Texas R. Co., 264 U. S. 79, 86-87, 68 L. ed. 569, 573,
Postal Telegraph-Cable Co. v. City of Newport, 247 U. S. 464, 62 L. ed. 1215,
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 394, 69 L. ed. 343, 347,
Director Gen. of R. R. v. Wechsler, 263 U. S. 22, 24, 68 L. ed. 143, 146,
Ward v. Board of County Commissioners, 253 U. S. 17, 22, 25, 64 L. ed. 754,
Hanover etc. Co. v. Carr, 272 U. S. 494, 509, 71 L. ed. 373, 380.

Third. If it be conceded that as the successor in title of the United States Asphalt Refining Company, the Richfield Oil Corporation is the owner of the reversionary interest in the land occupied by the Respondents under a grant for railway use and enjoyment, the decree of the state court is none the less in violation of the guaranties afforded by the Fourteenth Amendment to the Constitution of the United States. The basis for this position is (a) the nature and scope of the property rights of the Petitioners under

the grant to the Chesapeake and Curtis Bay Railway Company (R. 11-19) and (b) the confiscatory effect on these property rights by the decree.

THE RIGHT IN MARYLAND OF A RAILWAY CARRIER TO THE EXCLUSIVE POSSESSION AND ENJOYMENT OF ITS USED RAILWAY PREMISES.

1. In Maryland the law which subsists at the time and place of making a contract enters into and forms a part of it, as if it were expressly referred to or incorporated in the contractual terms; and this rule embraces alike those which affect its validity, construction, discharge and enforcement.

Slicing Machine Company v. Murphy, 161 Md. 667, 671, 672;

Williston on Contracts (Rev'd ed.), Sec. 615 and the parties to a deed are affected with this knowledge.

Brehm v. State Roads Commission, 176 Md. 411, 422.

2. At the time of its incorporation and its acquisition of its railroad site from the United States Asphalt Refining Company, the Chesapeake and Curtis Bay Railroad Company was authorized and empowered to construct, maintain and operate a railroad not exceeding 100 feet in width at the graded surface with the necessary additions for cuts and fills, and with as many tracks as it may deem necessary, and of an additional width for necessary side tracks, turnouts, depots, buildings and other works.

Annotated Code of Maryland (1924) title "*Corporations*", Art. 23, Sec. 207, Vol. 1, p. 743; *Idem.* (1939) Art. 23, Sec. 210, Vol. 1, p. 879.

3. Under Maryland law the railroad company was *at the time of the acquisition* of its right of way and real prop-

erty, and *continuously* until the decree in the instant case entitled to the exclusive possession of the said portion of its right of way and other real property.

The grant of this right of way to The Chesapeake and Curtis Bay Railroad Company for railway purposes vested in the grantee, its successors and assigns, so long as it continued to be used for railway purposes, an exclusive possession and enjoyment of the interest in the land granted. And this is true whether the interest in the land granted is called an "easement" or a base, qualified or determinable fee or a right of way.

It has long been settled law that a railway carrier is so largely engaged in the public service that it has acquired the status of a public instrumentality. It partakes of the sovereignty of the State in the exercise of the power of eminent domain to acquire its necessary estates in land from the private owner, who becomes a trespasser if he goes upon the carrier's right of way other than at a public crossing or at an agreed or reserved private crossing. On its right of way the carrier may place not only its tracks, and its other equipment for the movement, repair and housing of the rolling stock and accessories, but also its permanent structures, such as round-houses, signal system, passenger or freight station or railway hotel. The surface of the right of way may be raised to any height or lowered to any level. Over its railway and its land granted for railroad purposes, it of right transports, in either direction, its freight, express, mail and passengers at all times, whether by day or night, at any hour, minute or second.

It is of the nature of its public service, and inherent in the discharge of its functions, that the carrier have complete control and direction of its railway operations. The security and protection of its traffic, the regularity and certainty of departure, arrival and delivery in transporta-

tion, the safety of its servants and agents, as well as that of its licensees and passengers, and the fulfilment of its hazardous enterprises in the public interest are best met and assured by complete dominion and control of the carrier. No court has more steadfastly recognized and enforced this fundamental right of the carrier to exclusive control than the Court of Appeals of Maryland.

Hamilton v. Railroad Co., 1 Md. 567, 568;
State v. Railroad Co., 48 Md. 49;
Annapolis, etc., R. Co. v. Pumphrey, 72 Md. 82, 86;
State v. B. & O. R. R. Co., 69 Md. 494, 497;
B. & O. R. R. v. State, use of Allison, 62 Md. 479, 487;
Jackson v. Penna. R. Co., 176 Md. 6;
Am. Tel. & Tel. Co. v. Pearce, 71 Md. 535, 542, 544;
B. & P. R. R. Co. v. Magruder, 34 Md. 79;
State, use of Ricketts, v. B. & O. R. R. Co., 69 Md. 494.

The rule of exclusion also applies to its longitudinal surface.

It has been held in *Sapp v. Northern Central Railway Co.*, 51 Md. 115, at page 125, that a railroad corporation has no power or right to grant an easement of a footway for persons to walk along or by the side of their tracks. There can be no prescriptive right or presumption of such a grant, though the appellants and others, owning houses along the line of the appellee's railroad, for twenty-five years, had used a private footway, for some considerable distance over the lands of the appellee, alongside of, or between the tracks of the road, from the houses to a public highway.

Accord:

Libertini v. Schroeder, 149 Md. 484, 489, 495.

The rule of exclusion is enforced against a use *beneath* the surface of its railway. An authorized construction of a municipal sewer under a railway right of way can, if not assented to by the railway Company, only be made by the exercise of the power of eminent domain by the municipality and the payment of adequate compensation by the municipality to the owner of the railway right of way.

Baltimore City v. Cowen, 88 Md. 447, 451, 452, 453-456;
Central Ry. Co. v. Phila., etc., R. Co., 95 Md. 429, 438, 439-442;
Baltimore and Ohio R. Co. v. Baltimore, 94 Md. 535, 537;
United Railways & Electric Co. v. State Roads Commission, 123 Md. 561, 588;
Dobler v. Baltimore, 151 Md. 154, 162.

The crossing by one railroad corporation of another railroad or turnpike road is a taking of property for which compensation must be paid.

Baltimore & Havre de Grace Turnpike Co. v. Union Railway Co., 35 Md. 224, 230;
Northern Central Railway Co. v. Baltimore, 46 Md. 425-9, 452;
Central Ry. Co. v. Philadelphia Co., supra;
North Baltimore, etc., Ry. Co. v. North Ave. Ry. Co., 75 Md. 233, 242, 245;
Baltimore & Ohio Ry. Co. v. Baltimore City, 98 Md. 535;

See:

Water Co. v. Baltimore County, 105 Md. 154, 162.
Am. Tel. & Tel. Co. v. Pearce, 71 Md. 535, 542-552.

The Deed under which the Railroad Companies, Petitioners herein, acquired their rights and interests in the lands in question was executed and delivered at a time

when the doctrine above referred to was the established law of the State of Maryland. The instant decision and decree of the Court of Appeals of the State of Maryland which for the first time holds that a right of way for railroad purposes is not an exclusive right of way, therefore, clearly impairs the rights granted and conveyed by said deeds to The Chesapeake & Curtis Bay Railroad Company and thereby deprives the Railroad Companies of their property without due process of law contrary to the Fourteenth Amendment.

Muhlker vs. New York and Harlem Railroad Company, 197 U. S. 544.

See also:

Great Northern Railroad Company vs. Sunburst Oil and Refining Co., 287 U. S. 358, 362.

In the cases cited, the doctrine of the exclusive right of the railway company to its used premises for railway purposes has been consistently and uniformly enforced heretofore in Maryland, and is in accord with the decisions in the Supreme Court of the United States.

NO CONFLICT WITH THE FEDERAL RULE.

In like manner, it has been held to be in violation of constitutional guaranties and an unauthorized appropriation of railway property and so an unauthorized taking within the constitutional prohibitions for a grain elevator (a), a levee improvement (b) for a telegraph line (c) or for a public hack stand to occupy the railroad premises without the consent of the railroad company.

(a) *Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 405, 417 L. ed. 489, 494, 495.

(b) *Missouri, etc. R. Co. v. Rockwell County Levee Improvement District* (Tex.), 297 S. W. 206.

(c) *Louisville, etc. R. Co. v. Western Union Tel. Co.*, 250 U. S. 363, 63 L. ed. 1032.
Western Union Tel. Co. v. Louisville R. Co., 270 Ill. 399, 110 N. E. 583.
Western Union Tel. Co. v. Pennsylvania R. Co., 105 U. S. 164.
(d) *Delaware, etc. R. Co. v. Town of Morristown*, 276 U. S. 182, 72 L. ed. 523.

Similarly, a state highway commission's order directing a pipe line company transporting natural gas in both interstate and intrastate commerce to remove, lower or incase pipe and telephone lines where new highways would cross company's right of way would take private property for public use and a state statute construed as authorizing commission's order without compensation to company denied due process of law.

Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613, 79 L. ed. 1090; 295 U. S. 768 79 L. ed. 1709.
Calor Oil, etc., Co. v. Withers, 141 Ky. 489, 133 S. W. 210.

And in *Chicago, etc., Co. v. August E. Holmbert*, 282 U. S. 162-167, 75 L. ed. 270, it was held an order of the state railroad Commission requiring the construction, at the expense of a railroad company and the landowner, of an underpass connecting farm lands on both sides of the railroad tracks, solely for the convenience and benefit of the landowner in the use of his own property, and not because an existing surface crossing is dangerous to life or property, is invalid as taking property without due process of law.

Thus it appears that the law so announced and so long consistently enforced in Maryland is in accordance with the decisions of this learned tribunal. There is, it is sub-

mitted, no conflict with the position here maintained by the decision in *Great Northern Ry. Co. v. United States*, No. 149, argued on January 13, 1942, and decided February 2, 1942, and reported at page 529 of the Advance Sheets of the Supreme Court Reporter, 62 L. ed. No. 7. In that case the court determined that on a right of way granted to a Railroad by the United States through public lands, the grantee did not hold a fee and that it was *not a railway use* by the Railway Company for it to drill and remove oil and minerals underlying the right of way.

THE VIOLATION OF PROPERTY RIGHTS OF THE RAILROADS.

The right of way of the Petitioners is property. *Baltimore City v. Cowen*, 88 Md. 451, 452, 453. *Panhandle, etc., Co. v. State Highway Com.*, 294 U. S. 613, 618, 79 L. ed. 1091, 1095. And it is clear the decree provides for an actual invasion of the Petitioners' property rights on the surface and underground to the damage of the railway property rights.

> *Central Coal Co. vs. Georges Creek Coal Co.*, 37 Md. 537, 559.

All pipe lines or other crossings on the surface will occupy that much of the surface either to the exclusion of other tracks or necessitating changes in the surface conditions which would permit the safe use of the surface by both the railway tracks and equipment and the pipe lines of the Oil Corporation. In the surface construction there are two elements of damages. The *first* is the cost of the construction and of the maintenance of the new servitude, including the changes made necessary by the installation of a pipe line or crossing through which would flow a dangerous, combustible fluid.

> *Central Ry. Co. v. P. W. & B. R. Co.*, 95 Md. 442.

If the crossing by pipe line or other conduit is made under the surface, the passage has to be made by excavation across or through the right of way or yards or other premises of the Petitioners by trench or other methods to be followed by the installation of the line of pipes; restoration of the surface conditions, and the future safeguarding of the tracks in uniform level and gauge against the subsidence of the fill along the line of the transverse excavation. The primary obligation of keeping the roadbed in proper condition and the track safe would be enlarged so that in cost of maintenance and in added risk of responsibility and liability for loss and injury to their patrons and users the financial burdens of the carriers would be augmented.

The *second* element of damages is the value of the railroad property of the Petitioners, which may be impaired or appropriated by the installation.

> *Central Ry. Co. v. P. W. & B. R. Co.*, 95 Md. 442.
> *Baltimore & Ohio R. Co. v. Baltimore*, 98 Md. 535, 537, 538.

It may be contended that damages to cover the cost of maintenance and the depreciation in value of the Railroad property are too remote, indefinite and speculative. In reply to a similar argument it was said in the last cited case "But the mere fact that the amount cannot be fixed by proof with precision and certainty ought not to deprive a person of such redress as may be possible." pp. 539, 540. The record shows that the Oil Company's plans are not completed with respect to the installation of underground pipe lines across the Petitioner's premises. Other additional water pipe and oil lines are planned (R. 86, 97). The record also shows that other lines had been placed

without permission from any one nor did the Manager of the Richfield Oil Corporation confer with any one as to the time, location or manner in which they were to be placed (R. 80-83, 94, 155). The particular installation which gave rise to the present controversy was of eight-inch pipe, about 40 feet long, and incased in twelve-inch steel "sleeves". (R. 82). In response to a question whether the installation of the additional pipe line crossings or surface crossings with the proper operation and maintenance of the railroad or its right of way (R. 71), the former Superintendent and Receiver of the Interocean Oil Company testified:

> "That if such things are done it would be necessary to do them with the cooperation of the local railroad officials so that the thing can be timed properly so that there won't be any destructive elements entering into the situation, such as a locomotive running over excavated areas, or things of that character. So that it seems with proper cooperation these things might be done." (R. 71-72 and 149, 150, 156).

The following case is pertinent.

In *Baltimore City v. Cowen* (1898), 88 Md. 447, the railroad company had acquired by adverse user of more than thirty-five years a right of way for its railway over a lot of land, and the municipality of Baltimore subsequently acquired by condemnation the right to open at grade a street across said railway right of way. It was decided the later construction by the city of a sewer along the street and under the tracks was not a consequential damage arising from a change in the grade of the street, but that the construction of the sewer was an actual invasion of the property rights of the company, *pp. 451, 452.* Speaking

with reference to the quality of the company's interest, the court declared:

> "If a mere right of way, it is no less property, for a right of way is the right held by the company in the land over which its road runs for railroad purposes." *p. 452.*

Accord.

> *DeLauder v. County Comm. of Balto. County* (1902), 94 Md. 1, 6-7.

PERILS OF THE JUDGMENT AT BAR.

Not only does the decree authorize an actual invasion of the used portion of the right of way of the railroad companies with resultant damages and loss, at a particular point, but everywhere on its premises according to the will and choice of the Oil Company. The vital necessity of undivided control of the railroad property is stripped from its owners, which are deprived of all control over their used railway property where, without their approval of the method of installation, of the quality and fitness of material used, and of the supervision of the work and no provision in respect of its maintenance or for compensation, beyond the barren and wholly inadequate provision subsequent that the installation be performed in such manner and at such times as not to interfere with or interrupt the reasonable and proper use by the defendants of said rights of way for "railroad purposes." And while its property is thus taken from its use, control and possession the defendants, their agents and servants are reduced to the servitude of "lookers on in Venice", as they are

> "permanently enjoined and strictly prohibited from interfering with, obstructing or molesting Richfield Oil Corporation of New York, its agents and servants, in crossing or recrossing over or in placing its pipe lines, connections or other equipment necessary and

proper to the operation and enjoyment of its property across and under the rights of way of the defendant." (R. 257-258, 271, 277).

Baltimore & Ohio R. R. v. Baltimore, 98 Md. 537, 538.

See:

Central Ry. Co. v. Phil. etc., Rwy. Co., 95 Md. 444, 445.

The perils and burdens of the uses authorized by this decree increase the gravity of the situation under this decree.

Baltimore & Ohio R. R. v. Baltimore, Supra.

In *New York, N. H. & H. R. Co. v. Armstrong,* 92 Conn. 349, 102 A. 791, it is said:

"The liability of a break in the pipes through an accident upon the railroad, or otherwise, and the danger that the inflammable oil would be ignited, with the consequent destruction of trestle and rolling stock upon it, impose upon the plaintiff an imperative private and public duty to keep these pipes from its location."

Accord:

The Canada S. R. Co. v. Niagara Falls (1892), 22 Ont. L. R. 41.

THE IMPORTANCE OF THIS CASE IN INTERSTATE COMMERCE.

The importance of this case lies in the fact that it not only affects the rights of user for railway purposes by the Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company of their property through the Oil Company's land but a new doctrine has been announced which affects real property occupied by public service corporations throughout the State of Maryland engaged in interstate commerce under numerous similar grants. The facts of this record, without repetition

at this point, give emphasis how greatly in point of danger, delay, interruption of transportation and travel, and increased expense of maintenance, operation and protective measures the regular course of interstate commerce will be retarded, burdened and prejudicially affected as a direct consequence of the adoption of the doctrine of the Court of Appeals in the instant case.

VI.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the Petitioners will not be deprived of rights guaranteed them by the Fourteenth Amendment, and that to such end a writ of certiorari should be granted in this case and this Court should review the decision of the Court of Appeals of Maryland and finally reverse it.

Respectfully submitted,

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APPENDIX.

ANNOTATED CODE OF MARYLAND (1924) TITLE "CORPORATIONS", ART. 23, SEC. 207, VOL. 1, P. 743; *Idem.* (1939) ART. 23, SECTION 210, VOL. 1 P. 879.

"Any Railroad Company heretofore incorporated under the Laws of this State, whether incorporated under the provisions of this Article or by Special Act, or which may hereafter be incorporated under the Laws of this State, is hereby invested with all the rights and powers necessary to locate, construct, maintain and operate a railroad not exceeding one hundred (100) feet in width at the graded surface thereof, with the necessary addition thereto for slopes or embankments for cuts and fills, and with as many sets of tracks as it may deem necessary from time to time, and of additional width for such side tracks, turnouts, depots, buildings and other works as it shall deem necessary in connection with its said railroad between the termini named in its Certificate or Charter, or so far as its railroad may lie within the State of Maryland; and such Railroad Company is hereby further invested with all the rights and powers necessary and convenient to acquire, either by purchase or condemnation, all land and other property which it may deem necessary for the site of said railroad and the aforesaid additions thereto, either in fee simple or any less estate, in accordance with law; and such Railroad Company may exercise the rights and powers, with which by this section it is invested, from time to time and with respect to any portion of its existing line or railroad as the demands of its business may require; and nothing in this section shall be construed as in derogation of any rights and powers already conferred upon such Railroad Company by any of the provisions of this Article or by Special Act, but the rights and powers hereby conferred shall be construed as in enlargement of and supplementary to the rights and powers of the same kind already conferred upon such Railroad Company by the provisions of this Article or by Special Act. Provided that nothing herein shall be construed to authorize any railroad com-

pany to condemn, use or occupy upon, under or over any portion of any public highway in this State without the consent of the proper authorities of the Mayor and City Council of Baltimore as to any highway in Baltimore City, or of the County or City, as to any highway in any county or city therein, nor to take away, modify or restrict the powers of the said local authorities in said Baltimore City, or any other city or county in the State, as such powers existed prior to April 18, 1918, with regard to the imposition of terms and conditions for the grant of any right in, or upon giving their assent to the use of, any portion of any public highway of this State."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1226.

CHESAPEAKE AND CURTIS BAY RAILROAD COMPANY AND WESTERN MARYLAND RAILWAY COMPANY,

Petitioners,

vs.

RICHFIELD OIL CORPORATION OF NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

BRIEF BY THE RESPONDENT IN OPPOSITION.

J. COOKMAN BOYD, JR.,
FELIX C. LOURIE,
J. COOKMAN BOYD, SR.,
Counsel for Respondent.

The Daily Record Co. Print, Baltimore.

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OPINION BELOW.

The opinion of the Court of Appeals of Maryland in the first appeal (R. 243) is recorded in 179 Md. 560 (advance sheets) and in 20 Atl. (2d) 581; and the opinion in the second appeal (R. 272) is not yet officially reported but is unofficially reported in 23 Atl. (2d) 677.

JURISDICTION.

The opinion of the Court of Appeals of Maryland (R. 243) was entered on June 10, 1941. The Motion for Reargument by Petitioners was filed on July 9, 1941, and was overruled on July 11, 1941; and the mandate following said decision was filed July 12, 1941. The opinion of the Court of Appeals in the second appeal was filed January 13, 1942, and the mandate was filed February 9, 1942. No petition for writ of certiorari from said decisions of the Court of Appeals was filed, however, until May 8, 1942. Petitioners seek to invoke the jurisdiction of this court under Section 237(b) of the Judicial Code [28 U. S. C. A., §344(b)].

STATEMENT OF THE CASE.

The Richfield Oil Corporation of New York is a corporation engaged in the purchase, sale, refining, manufacture, storage, and distribution of oil and its products. It owns a large tract of land in fee bordering on Curtis Bay, in an outlying section of Baltimore City, Maryland, upon which is located its plant consisting of buildings, stills, tanks, etc., and pipe lines running throughout said tract, necessary for the purpose of carrying its products to and from its tanks and stills, connecting each with the other, and also connecting with the pier and loading racks used in shipping its products to and from said plant.

Running across said tract is a plant railroad, originally erected by the United States Asphalt Refining Company, predecessor in title to this Respondent, for the sole purpose of transporting its products to, from, and between its plant facilities. Later this railroad was incorporated as the Chesapeake and Curtis Bay Railroad Company by the owners of The United States Asphalt Refining Company.

An easement of right of way for railroad purposes, reserving to itself, however, certain rights of joint use thereof, was granted by the Asphalt Company to the Chesapeake and Curtis Bay Railroad Company by three deeds, one dated March 16, 1916, one dated January 2, 1924, and one dated September 11, 1925, which last was called an exchange deed and was merely a mutual deed between the two companies for the purpose of straightening out slight discrepancies as to small portions of said rights of way, all of which deeds are set forth R. 34, 36, 11.

Shortly thereafter the stock of the Chesapeake and Curtis Bay Railroad Company was purchased by the Western Maryland Railway Company, which Company has since operated and managed the Chesapeake and Curtis Bay Railroad.

Reference to Plats (R. 10A, 34A, 36A) will show that the railroad rights of way were so laid out from the very beginning, by the original owner of the land and the railroad, so that if the same were granted in fee simple to a third party, the same would divide the property into approximately twelve separate, distinct parcels of land, each, for all practical purposes, inaccessible from the others. However, pipe lines for carrying oil, necessary and proper to the operation of the plant, were laid under the railroad rights of way at various places, from time to time, since the inception of the railroad continuously to the time of the trouble complained of in this cause in 1940, under claim of right, without asking or receiving permission from, and with full knowledge of, the railroad companies, the Petitioners herein.

The Richfield Oil Corporation, in pursuance of a general plan for developing its property into a modern and well-equipped terminal, on the evening of November 2, 1940,

and at a time which was calculated not to, nor which in any way did, interfere with or interrupt the reasonable and proper use by the Railroad Companies of said rights of way for railroad purposes, or unreasonably interfere with the operation or maintenance of said railroad tracks and rights of way, or the operation of cars over the right of way, and and with due regard to the safe, proper, and convenient operation of the railroad, placed certain sleeves and pipes necessary for the transportation of its petroleum products from one part of its property and continuing through the same under the tracks and said rights of way of the Railroad Companies; and said pipes were laid in a workmanlike manner and in conformity with other pipe lines theretofore previously, and continuously, laid under said rights of way. On the next day the Railroad Companies trespassed on the property of the Richfield Oil Corporation and attempted to remove said pipes and sleeves from under the tracks and rights of way of the Railroad Companies, and did succeed in partially cutting, burning, mutilating, and partially destroying the aforesaid sleeves and pipes belonging to the Richfield Oil Corporation.

Thereupon and thereafter the Richfield Oil Corporation filed its Bill of Complaint in the Circuit Court No. 2 of Baltimore City against the Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company, in which it was prayed "that the Defendants, they and each of them, their agents and servants, be permanently enjoined and strictly prohibited from interfering, obstructing, or molesting the Complainant, its agents and servants, in crossing or recrossing over, or in placing its pipe lines, connections, or other equipment necessary and proper to the operation and enjoyment of Complainant's property hereinabove described, across and under the right of way of Defendants located on the Complainant's said

property, provided, however, that the same be performed by the Complainant in such manner as not to interfere with or interrupt the reasonable and proper use by the Defendants of said right of way for railroad purposes."

Thereafter the Circuit Court No. 2 of Baltimore City, upon hearing, refused to grant the injunction prayed and dismissed the Bill of Complaint. From this action of the Court an appeal was taken to the Court of Appeals of Maryland by Richfield Oil Corporation, respondent here, and, after due and final hearing, the Court of Appeals of Maryland reversed the action of the lower Court and filed its opinion, wherein it stated that the primary question to be decided is whether the appellees, Chesapeake and Curtis Bay Railroad Company and Western Maryland Railway company own the fee of the land underlying its railroad tracks. The Appellate Court found that the fee was in respondent here, Richfield Oil Corporation of New York, and that an easement of rights of way for railroad purposes is in the Petitioner, Chesapeake and Curtis Bay Railroad Company. It further found that "the Richfield Oil Corporation of New York had the right of crossing or recrossing over, or in placing its pipe lines or other equipment necessary and proper to the operation and enjoyment of its property across and under the right of way of the Chesapeake and Curtis Bay Railroad Company located on the property owned by the Richfield Oil Corporation in fee, *"provided, however, that this be performed by the Appellant in such manner and at such times as not to interfere with or interrupt the reasonable and proper use by the Appellee of said rights of way for railroad purposes."* (Italics added.) The Court said:

> "For the reasons herein given we find that the injunction should have been granted as prayed." (R. 255)

The decree of the Circuit Court No. 2 of Baltimore City was thereupon reversed, with costs, and the case was remanded for the passage of a decree in accordance with the views expressed in said opinion. The case was remanded to the lower Court for the *sole* purpose of entering a decree in accordance with the views expressed by the Court of Appeals of Maryland, and on July 15, 1941, a decree was signed by the Circuit Court No. 2 of Baltimore strictly in accordance with the mandate of the Court of Appeals of Maryland. From that decree another appeal was taken to the Court of Appeals of Maryland, and on the 13th day of January, 1942, in deciding this second appeal, the Court of Appeals of Maryland affirmed the action of the lower Court in entering this decree, as being in strict conformity with the first opinion and mandate.

ARGUMENT.

I.

THE FEDERAL QUESTIONS SET FORTH IN THE PETITION FOR CERTIORARI WERE NOT DULY RAISED.

The Certificate of Chief Judge dated April 1, 1942 (R. 276) is erroneous and not in accord with the facts and record. This Certificate was prepared by counsel for Petitioners, was presented for signature, and was included in this Record ex parte, without notice before or after to counsel for respondent—certainly not a practice to be commended. Upon motion of Respondent, the same has been modified by Stipulation and Certificate of Chief Judge dated May 11, 1942, wherein it will appear by said modified Certificate (R. 278) that "the Federal questions set forth in the Certificate of the Chief Judge dated April 1, 1942 (R. 276) were not raised or urged by the Appellants in the first appeal and the same were not considered by this Court in its deliberations leading up to and resulting in the opinion of this Court dated June 10, 1941."

The Certificate of Chief Judge dated April 1, 1942, insofar as the same applies to the second appeal should be carefully considered in connection with the actual record.

Powell vs. Brunswick County, 150 U. S. 433

The Chief Judge who signed the same did not hear the case argued on the second appeal (R. 272); and in the opinion in that appeal it was said:

> "The Constitution of Maryland, Art. 4, Sec. 15, provides that the judgments of the Court of Appeals shall be final and conclusive. Therefore, the decision of this Court in any cause is binding upon the lower Court and cannot be disregarded. Likewise, any decree which conforms with the opinion and mandate of the Court of Appeals is binding in subsequent proceedings in the same cause. No litigant can be allowed to prosecute different and successive appeals on the same state of the record, except in case of new proceedings since the last appeal and then only in respect to questions raised by the new proceedings."

thus reaffirming a long line of Maryland cases to the effect that the Court will not consider on second appeal questions not previously raised on the record, or properly arising out of actual new proceedings, of which there were, and could have been, none in this case.

The Respondent herein respectfully, but emphatically, contends that the decision of the Court of Appeals of Maryland dated June 10, 1941, was a final decision upon all questions involved in the case. That decision finally decided (1) that the Richfield Oil Corporation owned the fee (R. 254), (2) that Chesapeake and Curtis Bay Railroad Company owned only an easement in the right of way for railroad purposes (R. 254), (3) that "the appellant (Richfield Oil Corporation), its agents and servants have the right of crossing or re-crossing over, or in placing its pipe

lines, connections or other equipment necessary and proper to the operation and enjoyment of appellant's property across and under the right of way of appellees located on the property owned by the appellant in fee provided, however, that this be performed by the appellant in such manner and at such times as not to interfere with or interrupt the reasonable and proper use by the appellees of said rights of way for railroad purposes." (R. 255), and (4) that the injunction should have been granted as prayed (R. 255).

The above was the final decision on the merits of all questions involved in the case.

In the case of *Rio Grande Western R. Co. vs. Stringham*, 239 U. S. at 47, the Court says:

> "Manifestly the first judgment was final within the meaning of the Jud. Code, §344. It disposed of the whole case on the merits, directed what judgment should be entered, and left nothing to the judicial discretion of the trial court."

It would appear that the *Stringham* case was approved in *First Bank Stock Corporation vs. Minnesota*, 300 U. S. 635, wherein it is stated:

> "The appeal herein is dismissed upon the authority of Rio Grande Western Ry. Co. vs. Stringham, 239 U. S. 44, 47."

In the modified Certificate of Chief Judge it appears, and it is indeed conceded, that no federal question of any kind whatsoever was raised or urged, considered, or decided in the first appeal. This fact is also true of the pleadings, evidence, and briefs of counsel.

In the first appeal the opinion of the Court of Appeals of Maryland was filed June 10, 1941. Thereafter, but

before the mandate was sent down, a Petition and Motion for Reargument by the Chesapeake and Curtis Bay Railroad Company and Western Maryland Railway Company, wherein said Petitioners simply reiterated their former argument, was filed and overruled. In Petitioners Motion for Reargument, not one word attempting to raise a federal question appears. This motion is covered by the modified certificate of Chief Judge dated May 11, 1942 (R. 278). Since the same was not included as part of the transcript of record in this case, copy thereof is filed as Appendix "A" to this Brief in opposition. On the 12th day of July, 1941, the case was remanded to the lower Court for the purpose, *and only for the purpose,* of having the lower Court enter a decree in accordance with the decision of the Court of Appeals of Maryland (R. 256). It had been decided that the fee was in Respondent; that the Chesapeake and Curtis Bay Railroad Company had an easement in the right of way for railroad purposes; and that the Respondent was entitled to the injunction as prayed. There was no exercise of discretion left to the lower Court. It was only a ministerial body for the sole purpose of carrying out the order of the Court of Appeals as explicitly directed in the first appeal.

On the 22nd of July 1941, before the Circuit Court No. 2 of Baltimore City, when the decree which had been previously signed was presented for filing, counsel for Petitioners, Mr. Parke, in discussing the terms of the decree stated as follows:

> "and the decree follows accurately what the Court of Appeals did say in the opinion verbatim—" (R. 264).

It was upon this occasion, on the 22nd day of July, 1941, and *for the first time since the inception of the litigation,* that there was any suggestion or intimation that any fed-

eral question, whether constitutional, statutory, or of interstate commerce, was sought to be involved.

The original bill of complaint was simple, and based on the claimed title to the land in question plainly prayed for an injunction expressly set out therein (R. 6). Consequently, Petitioners from the outset were confronted with full knowledge of the ultimate relief which might be granted under the bill, and which actually was directed to be granted by the decision in the first appeal. If Petitioners felt they had any federal rights which could have been affected by the relief prayed, they were bound to anticipate such situation, set up their rights in defense of the suit and urge the same in due time and fashion.

Petitioners did none of these things. Their answer (R. 19) to the bill is silent as to any federal question, as is the opinion of the trial court (R. 228); likewise Petitioners' brief in the first appeal to the Court of Appeals of Maryland.

East Tennessee V. & G. R. Co. vs. Frazier, 139 U. S. 288
Hurlbert vs. Chicago, 202 U. S. 275
Cox vs. Texas, 202 U. S. 446.

The decision of that Court fully and explicitly informed Petitioners that the relief as prayed by the bill was granted Respondent. Even had Petitioners in their motion for reargument attempted to raise a federal question it would not have been timely, because said decision could not be regarded as unanticipated.

Herndon vs. Georgia, 295 U. S. 441
Missouri ex rel Missouri Insurance Co. vs. Gehner, 281 U. S. 313, 320
Citizens National Bank vs. Durr, 257 U. S. 99.

Therefore, when the decree was presented to the trial court, admitted by Petitioners' counsel to follow the decision of the Court of Appeals "verbatim" it was too late to attempt to conjure into the situation federal questions never before mentioned.

II.

NO CONSTITUTIONAL RIGHTS OF THE PETITIONERS WERE IN ANY WAY AFFECTED OR VIOLATED BY THE DECISIONS OF THE COURT OF APPEALS OF MARYLAND.

It would unduly prolong this brief in opposition were Respondent to reargue the case from its inception, as has been attempted by Petitioners in their brief. The opinion of the Court of Appeals of Maryland in the first appeal (R. 243)-(R. 256) so fully and clearly sets forth both facts and authorities as to preclude the necessity thereof, and this Respondent relies on and expressly refers thereto.

There are, however, several noteworthy matters to which proper attention has not been paid in Petitioners' brief and petition. The railroad in question transversing the property of the Respondent was originally constructed back in 1912 and thereafter, by the then owner of the property, The United States Asphalt Refining Company, as a plant railroad, dead-ending as to one of its terminii on the waters of Curtis Bay, binding on the instant property, for its own convenience in operating an oil refining and storage plant; and in 1916 was incorporated by the owners of the property as the Chesapeake and Curtis Bay Railroad Company, one of the Petitioners. The record shows, moreover, (R. 134) that Petitioner, Western Maryland Railway Company, was in every way familiar with the inception, and construction of the railroad both before and after its incorporation; and, in fact, said Petitioner made most of the installations of railroad equipment on the various rights of way.

Consequently, both Petitioners were fully aware of the purpose for which the railroad was originally created and of the manner in which that purpose was carried out, to wit, the placing of pipe lines under and above and across the various rights of way, whenever and wherever the same were necessary for the operation of the oil refinery and terminal, consistent with reasonable and safe use of said rights of way for railroad purposes, and various crossings for pedestrian or vehicular purposes where the same were likewise necessary and proper.

Petitioner, Western Maryland Railway Company, prior to its purchase of the stock of the Chesapeake and Curtis Bay Railroad Company was familiar with the title situation as indicated by the deeds of March 16, 1916, January 2, 1924, and September 11, 1925, in all three of which the grant is of, and only of, "the right of way for railroad purposes." (R. 34, 36, 13). The Chesapeake and Curtis Bay Railroad Company was, likewise, thoroughly familiar with the fact that the Court of Appeals of Maryland, in the case of *Texas Company vs. United States Asphalt Refining Co.*, 140 Md. 350, 357, 358, in which case said Petitioner *was a party defendant*, had interpreted the deed of March 16, 1916, and had said:

> "The deed to the railroad company did not convey to it the fee in any part of the land in connection with which the pre-existing easement has been used." (R. 246)

However, Western Maryland Railway Company did not, prior to the time of the consummation of its purchase of the stock of Chesapeake and Curtis Bay Railroad Company, rely on its own interpretation of the records or facts in connection with said railroad, but took the further precaution of applying to and receiving from a recognized title com-

pany, The Title Guarantee & Trust Company in Baltimore, a search and guarantee of the title to and the exact nature of the estate held by the Chesapeake and Curtis Bay Railroad Company, and was advised that the same was but a right of way (R. 202). The Court of Appeals of Maryland held this evidence clearly admissable to show "the understanding which the Western Maryland Railway Company had as to the title at the time of the purchase of the stock." (R. 251)

The conclusion is inevitable that the decision of the Court of Appeals as to the status of the title to this property came as no surprise to the Petitioners. Petitioners were fully aware of the fact that pipe lines under and surface crossings for vehicles and pedestrians, when and where the same had been necessary to the proper operation and use of the oil plant transversed by these railroad tracks and consistent with the safe and proper operation of railroad equipment over the same, had been installed from time to time and used constantly for more than twenty-five years without complaint or objection on the part of Petitioners and without danger to or the slightest interference with the proper and safe operation of the railroad.

Any construction to the contrary would be absurd, as was so pertinently stated by the Court of Appeals of Maryland in its decision on the first appeal (R. 252)

> "The railroad tracks had been laid by the United States Asphalt Refining Company for its own use in transportation of its products. At the time of the incorporation of The Chesapeake & Curtis Bay Railroad Company, both companies were owned by the same interests. It is hardly conceivable that the interests which controlled the parent corporation would create and cause to be conveyed to another corporation a strip of land in fee running through its property, for

by so doing the control and ownership of the newly created corporation might pass to entirely different interests, whereby the parent company might be cut off and not allowed to cross from one part of its property to another, and particularly with tanks and stills on all parts of its property such crossings were necessary for the proper operation of its business."

Replying to the contention in Petitioners' brief, page 48, that the instant decision and decree of the Court of Appeals of the State of Maryland for the first time holds that a right of way for railroad purpose is not an exclusive right of way, and, therefore, impairs the rights granted and conveyed by said deeds, this Respondent says the Maryland Court of Appeals has been consistent in its rulings upon the question of rights of way. In *Bosley vs. Susquehanna Canal*, 3 Bland 63, *decided in 1830*, the Maryland Court of Appeals said at p. 67:

> "A right of way, whether public or private, is essentially different from a fee simple right to the land itself over which the way passes. A right of way is nothing more than a special and limited right of use; and every other right or benefit derivable from the land, not essentially injurious to, or incompatible with the peculiar use called the right of way, belongs as absolutely and entirely to the holder of the fee simple as if no such right of way existed. He is, in fact, for every purpose considered as the absolute owner of the land, subject only to an easement or servitude; he may recover the land so charged by ejectment; he may bring an action of trespass against any one who does any injury to it, not properly incident to an exercise of the right of way; he has a right to the trees growing upon it; to all minerals under its surface; *he may carry water in pipes under it;* and the freehold with all its profits, not inconsistent with the right of way, belong to him." (Italics supplied.)

This case was quoted with approval by the Maryland Court of Appeals in *Pub. Serv. Comm. vs. Gas Etc. Corp.*, 162 Md. at 312, decided in 1932. The same principles were affirmed in the present case.

In *Great Northern Ry. Co. vs. United States,* No. 149 October Term, 1941, 62 S. Ct. 529, this Court construed the General Railroad Right-of-Way Act to grant only an easement, and said at p. 533, "* * * a railroad may be operated though its right of way be but an easement."

III.

THERE HAS BEEN, AND CAN BE, NO INTERFERENCE WITH INTERSTATE COMMERCE.

Likewise, without merit or foundation is the claim in Petitioners brief, pages 54-55, that the doctrine announced by the Court of Appeals of Maryland in the instant case will result in interstate commerce being retarded, burdened and prejudicially affected, especially when the character of the Petitioners railroad is considered, constituting as it does little more than terminal plant facilities, and which obviously has been operated without interference with interstate commerce, despite the continuing existence and operation for so long a time of equipment identical with the pipe lines out of which the controversy arose.

The inconsistency of Petitioners' present claims is aptly shown by comparing the same with Petitioners' position at the trial below, when counsel for Petitioners admitted that there had been and would be no interference with interstate commerce by reason of pipe or other crossings, when they said:

> "Mr. Williams: The Railway Company has never denied access to those parcels and would not expect to deny access to them * * * (R. 56)
>
> * * * * * *

Mr. Williams: * * * If they have the fee then, perhaps, there would be occasion to ask this Court for an injunction.

The Court: If they have the fee?

Mr. Williams: If they have the fee. So as not to confuse these other parcels, if they own the fee here where they laid the pipes and we undertook to prevent them, I suppose they are entitled to relief * * *" (R. 57).

The attempted additions by the Petitioners in their brief filed in this Court of the words "on" and "upon * * * the surface" of Petitioners' right of way, to the language of the Court of Appeals' decision in describing Respondent's right of crossing, although said words "on" and "upon * * * the surface" nowhere appear therein, constitute repetitious and unwarranted interpolations. They appear so frequently in Petitioners' brief as almost to remove their use from the category of chance or understandable error.

Reference need only be made, however, to the injunction as prayed and granted to perceive that there can be no interference with the proper operation of the railroad, either its commerce inter or intra-state, as the injunction provides that such crossings as may be made by Respondent must be made in such manner and at such times as not to interfere with the reasonable and proper use by Petitioners of the rights of way for railroad purposes.

CONCLUSION.

Respondent submits that the decision of the Court of Appeals of Maryland in the first appeal and on the Motion for Reargument thereon finally disposed of all the questions which could be properly raised on the merits of this case, and that the action of Petitioners in seeking to raise the federal questions on which their petition is based for

the first time at the time of the filing of the decree on July 22, 1941, and the appeal therefrom, was obviously an afterthought and constitutes no more than a thinly veiled and disingenious attempt to have considered and reversed questions of law and fact which had been fully and finally disposed of and rightly decided.

Respondent submits that the writ should be denied because

I. No federal questions were raised in due or timely manner before the Court of Appeals of the State of Maryland; and the petition for the writ should have been filed, if at all, within the prescribed time following the first appeal and decision therein;

II. No constitutional or property rights of Petitioners have in any way been violated or affected by the decisions of the Court of Appeals of Maryland in this case; and

III. The subject matter of this litigation does not raise any real or substantial federal questions but only questions uniformly decided against the contentions of Petitioners.

Respectfully,

J. COOKMAN BOYD, JR.,

FELIX C. LOURIE,

J. COOKMAN BOYD, SR.,

Counsel for Respondent.

Office - Supreme Court, U. S.
FILED
MAY 26 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1226.

CHESAPEAKE AND CURTIS BAY RAILROAD COMPANY AND WESTERN MARYLAND RAILWAY COMPANY,

Petitioners,

vs.

RICHFIELD OIL CORPORATION OF NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

APPENDIX "A" TO BRIEF BY THE RESPONDENT IN OPPOSITION.

J. COOKMAN BOYD, JR.,
of Baltimore, Md.,

FELIX C. LOURIE,
of New York, N. Y.,

J. COOKMAN BOYD,
of Baltimore, Md.,

Counsel for Respondents.

The Daily Record Co. Print, Baltimore.

RICHFIELD OIL CORPORATION OF NEW YORK,
Appellant,

VS.

THE CHESAPEAKE & CURTIS BAY RAILROAD COMPANY AND THE WESTERN MARYLAND RAILWAY COMPANY,
Appellees.

IN THE

Court of Appeals

OF MARYLAND.

APRIL TERM, 1941.

GENERAL DOCKET NO. 38.

OPINION FILED JUNE 10, 1941.

PETITION AND MOTION FOR RE-ARGUMENT OF THE CHESAPEAKE & CURTIS BAY RAILROAD COMPANY AND THE WESTERN MARYLAND RAILWAY COMPANY, APPELLEES.

EUGENE S. WILLIAMS,
WILLIAM R. SEMANS,
F. NEAL PARKE,
Solicitors for Appellees.

The Daily Record Co. Print, Baltimore.

RICHFIELD OIL CORPORATION OF NEW YORK, *Appellant,*	IN THE **Court of Appeals** OF MARYLAND.
VS.	
THE CHESAPEAKE & CURTIS BAY RAILROAD COMPANY AND THE WESTERN MARYLAND RAILWAY COMPANY, *Appellees.*	APRIL TERM, 1941.
	GENERAL DOCKET No. 38.

OPINION FILED JUNE 10, 1941.

PETITION AND MOTION FOR RE-ARGUMENT OF THE CHESAPEAKE & CURTIS BAY RAILROAD COMPANY AND THE WESTERN MARYLAND RAILWAY COMPANY, APPELLEES.

To the Honorable, the Judges of the Court of Appeals of Maryland:

The Chesapeake and Curtis Bay Railroad Company and The Western Maryland Railway Company, appellees in the above entitled appeals, by Eugene S. Williams, William R. Semans and F. Neal Parke, their solicitors, respectfully pray your Honorable Court to grant a re-argument in the above entitled appeal in which the

opinion of your Honorable Court, holding that the decree of the Chancellor should be reversed, was filed on June 10th, 1941; and your said petitioners hereby humbly show the grounds for such motion for re-argument to be those which are now next hereinafter respectfully stated and set forth.

FIRST GROUND.

I. The material mistake or error of law in the Court's holding admissible parol testimony as to (*a*) the *intention* of the parties grantor and grantee in reference to whether an easement or fee was to pass under the deed of September 11, 1925, at the time of its execution, and as to (*b*) the legal effect of this grant; and the consideration of this parol testimony in connection with the conclusion reached by the appellate court in its construction of the deeds here in question.

The opinion of the Court (*Daily Record, June 19, 1941, cols. 3 and 4, p. 3*) contains a summary of this opinion and parol testimony and declares:

> "The chancellor admitted extrinsic evidence, over exception, as to the intention of the parties at the time this deed of September 11, 1925, was executed and we believe it was rightfully admitted."

The nature of this testimony is illustrated by this further excerpt from the opinion of Court:

> "Mr. Boyd denied that he ever made a statement about The Chesapeake and Curtis Bay Railroad Company owning in fee the land over which its tracks were placed and further stated that no fee was ever granted nor was there ever any intention of granting a fee."

It is earnestly urged that property rights in land are gravely imperiled if the meaning and effect of the instruments of writing whereby the interest and estate alone may be transferred are to be affected, limited or controlled by extensive parol testimony of the *intention* of a party with regard to the effect of an authentic and valid conveyance of the prescribed statutory requirements.

The effect of negotiations is not gathered from previous writing and conferences but from the single instrument which the law requires and the parties adopt as the embodiment of the transaction between the parties in the assignment of an interest in land. As stated by Wigmore on Evidence (2 ed.) sec. 2425:

> "When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are immaterial for the purpose of determining what are the terms of their act."

Thus, the construction of a deed is a matter of law for the court (*a*) and, in the absence of fraud, accident or mistake, parol evidence is not admissible to vary, contradict or alter terms of a deed (*b*). There is no issue on the present record of fraud, accident or mistake, and, so, the whole question is one of law for the court. In its construction, the court, if necessary, may resort to the situation of the parties and the surrounding circumstances in order to ascertain the true intention of the parties, (*c*) but this does not permit the admission of parol and extrinsic testimony of opinion and purpose, and a party's conception of the meaning and effect of a deed. *Supra.*

(*a*) Cadwalader v. Price, 111 Md. 310
Hayes v. United Rwys. & Electric Co., 124 Md. 687

Kelso v. Stigar, 75 Md. 376
Bogart v. Willis (1930) 158 Md. 393
O'Ferrall v. DeLux Sign Co. (1930) 158 Md. 544
Schwartz v. Wilmer, 90 Md. 136.

(b) Fowler v. Pendleton, 121 Md. 297
Owens v. Graetzel, 132 Atl. 265
Whitelock v. Whitelock, 156 Md. 115
Kvedera v. Mondravitzky, 145 Md. 260
Warren Glass Works Co. v. Keystone Coal Co., 65 Md. 547
Robinson Const. Co. v. Barry, 135 Md. 275
Prudential Ins. Co. v. Devoe, 98 Md. 584
Citizens Mut. Fire Ins. Co. v. Conowingo Bridge Co., 116 Md. 422
Diamond v. Shriver, 114 Md. 643
Standard Scale & Supply Co. v. Baltimore etc. Co., 136 Md. 278
Parran v. Wilson, 160 Md. 604
Powers Foundry Co. v. Miller, 166 Md. 590
James L. Kernan Co. v. Cook, 162 Md. 137
Levy, et al. v. Dundalk Co., 11 Atl. (2nd) 476
Buchwald v. Buchwald, 175 Md. 115
Gross v. Stone, 173 Md. 653.

(c) Buckner v. Hesson (1930), 159 Md. 461
Maryland State Fair v. Schmidt, 147 Md. 613
Hammond v. Hammond, 159 Md. 563
Gassinger v. Thillman, 160 Md. 194
Winter v. White, 70 Md. 305
Bowie v. Western Maryland R. R. Co., 133 Md. 1
Roberts v. Roberts, 102 Md. 131
Brown v. Reeder, 108 Md. 653
Logsden v. Brailer Mining Co., 123 Md. 113
Neavitt v. Lightner, 155 Md. 365
Marden v. Leimbach, 115 Md. 206
Maryland State Fair v. Schmidt, 147 Md. 613
Weinbeck v. Dahms, 134 Md. 464.

Should this Honorable Court, on further deliberation, hold that the parol testimony here assailed is admissible, then it is respectfully requested that it give, on re-argument, your petitioners the opportunity to analyze this parol testimony particularly in view of the circumstance that the testimony of Mr. J. Cookman Boyd, Sr., found his recollection of acts, conversations and intentions when he testified in this cause at variance and in conflict with his earlier recollection, when the events were fresher in his memory and in accord with documentary proof and the recollection of other witnesses.

In this connection, and going to the weight of this testimony, your petitioners respectfully present this summary of the pertinent and material circumstances, whose vital significance needs further presentation for a proper evaluation of the extrinsic testimony considered by the court.

Both United States Asphalt Refining Company and its then affiliate, The Chesapeake and Curtis Bay Railroad Company, grantor and grantee, respectively, in the deed of September 11, 1925, had, as their joint officer and representative in charge of the conveyance, Mr. J. Cookman Boyd, Sr.; that he was not only a director of both companies, a "kind of managing director" of the Asphalt Company, and President of the Chesapeake and Curtis Bay, but also General Counsel of both companies; that in such a situation the dual representative, in view of his peculiar knowledge and authority, speaks with a special force, tantamount to practical finality, upon the intent and purpose of the deed from the one company to the other, and that the true and legal effect of the deed can only be recognized accordingly. The petitioners further point out to your Honors that during the negotia-

tions leading to the sale of the stock of the Chesapeake and Curtis Bay to the Western Maryland, when by reason of the ambiguity of the deed the question first arose as to the title which had been conveyed, Mr. Boyd himself settled that question once and for all by his positive and unequivocal acts and deeds next briefly described:

(a) He addressed to the then President of the Western Maryland a letter wherein he stated the following:

> "It is agreed and understood that a good and merchantable title shall be given of all of its land and right of way, located at Wagners Point, Curtis Bay, Baltimore, amounting to fifteen (15) Acres, more or less, but only all its right, title and interest in and to the tracks and right of way on the strip of land set aside for railroad purposes running from First Avenue easterly and southerly along the boundary line of the land owned by the Texas Oil Company there situate." (R. 62).

This letter was acknowledged by Mr. George P. Bagby, then chief legal officer of the Western Maryland, wherein the offer of sale was accepted on the above quoted terms (R. 64).

(b) Thereafter, Mr. Boyd executed an agreement in connection with the transaction wherein it is recited (R. 64):

> "it being understood and agreed that the Chesapeake and Curtis Bay Railroad Company has a good and merchantable title, free of all liens and encumbrances to all of its personal property and to all of its *land*, right of way and tracks * * *, amounting to 15 acres, more or less, *save and except the tracks and right of way on the strip of land set aside for railroad purposes, in and to which the Chesapeake and Curtis Bay Railroad Company claims a right, title and interest*" * * *.

(c) Then followed the hearing before the Interstate Commerce Commission on the application of the Western Maryland for authority to purchase the stock of the Chesapeake and Curtis Bay. The application was contested by other interests on the ground that the purchase price was excessive. At that hearing Mr. Boyd appeared as a principal witness in support of the sale, *still representing the community of interests composed of the Asphalt Company and the Chesapeake and Curtis Bay, grantor and grantee, respectively, and their largely identical stockholders, and on the very question of ownership testified*, in part (our Brief p. 29, et seq.):

> * * * We think the *land* we have down there is worth fully as much without the tracks themselves as we are getting for this. * * *
>
> * * * I know this: That the *land* acquired by the Chesapeake and Curtis Bay from the United States Asphalt Company was acquired at a very, very low price. * * *
>
> * * * You recall that for an expenditure as of the tracks, in addition to that of the *land*, I just stated the land was * * * sold to the road at an exceedingly small price away back in 1915; that in 1926 (1925) additional *land* was given to the road in exchange for *land;* that the property had increased, insofar as land values alone were concerned and Wagner's Point in one particular place, not 100 per cent but 300 and 400 per cent. * * *
>
> * * * Therefore it is very, very difficult to arrive at exact values about that, but I do say * * * that the 15 acres of *ground* alone outside of the trackage are worth very much more than the $325,000.
>
> * * * We had the *land*. * * * The *land* itself increased. When we came to sell that, then we took into consideration the increased value of the *land*.
>
> * * * There was an exchange between the Railroad Company and the Asphalt Company in 1925,

> * * * by which we acquired by giving over *land* that would be useful to them other *land* that would be useful to us. In other words, we gave back *lands* that might be utilized by the company for *lands* that were not usable for railroad purposes."

The petitioners respectfully maintain that the foregoing testimony of the executive officer and legal representative of the respective parties to the deed cannot be construed to mean other than what it states in plain, unmistakable language; that it does not stand to reason that one of Mr. Boyd's legal and business experience could and would, in testifying on the issue of the value of the property, repeatedly and insistently assert that the Chesapeake and Curtis Bay owned the *land*, without meaning that it owned the *land*, as distinguished from an easement; nor can any other conclusion be rationally drawn than that Mr. Boyd's most manifest purpose, as spokesman and directing agent for the inter-related grantor and grantee, both in the actual conveyancing and in the subsequent explaining and interpreting of that conveyancing, was to satisfy and assure the Interstate Commerce Commission and the Western Maryland, by his emphatic testimony and by the above mentioned documents, that the Asphalt Company had positively conveyed the actual land—that is, the fee,—to the Chesapeake and Curtis Bay by the deed of September 11, 1925. Surely no stronger proof could be desired from the surrounding facts and circumstances.

Your petitioners further respectfully assert that under principles of law firmly established by this Court, the words and acts of Mr. Boyd, specifically directed to the question of the character of title that had been conveyed by the one company—of which he was part and for which he had acted in the conveyancing and was then acting—to the other company—of which he was part and

for which he had acted in the conveyancing and was then acting—for the purpose of proving and establishing once and for all the effect of such conveyancing, carry the strongest possible significance, and that, in view of his peculiar knowledge and authority are, in absence of incontrovertible evidence to the contrary, determinative of the intent, purpose and effect of the deed, if extrinsic evidence is to be considered.

SECOND GROUND.

II. The material mistake of error of law in the court's construction of the effect of the grants in controversy in holding that by these grants:

A. That the Chesapeake and Curtis Bay Railroad Company had a mere easement in the parcels conveyed to it; and that this easement was subject to the right of the Richfield Oil Corporation of New York of crossing or recrossing over, or in placing its pipe lines, connections or other equipment necessary and proper to the operation and enjoyment of the appellant's property across and under the right of way of the Chesapeake and Curtis Bay Railroad Company located on the property owned by the Richfield Oil Corporation of New York in fee, provided, however, that this be performed by the latter company in such manner and at such times as not to interfere with or interrupt the reasonable and proper use of the Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company of said rights of way for railroad purposes. (Opinion, Daily Record, col. 6, p. 3, June 19, 1941).

B. That the Richfield Oil Corporation of New York had any title in fee or in reversion in and to the land occupied and enjoyed by the Chesapeake and Curtis Bay Railroad Company.

C. The decision is without precedent. Counsel for appellant has submitted none, nor has the search of counsel for appellees found its counterpart. While the Railroad Company runs through the property of the Richfield Oil Corporation, its original location as an industrial railway was the self-serving choice of the owner of the traversed land, the predecessor in title of the Richfield Oil Corporation; and the continued use and service of the Railroad Company have been employed in the transportation service of the Richfield Oil Corporation and the former corporate owners from which it derived its title and plant. The location of the Railroad Company's roadbed, tracks, yards and buildings did not deprive the successive owners of the tract with access to the land on opposite sides of the railway property. Such access was afforded by a public highway running, east and west, midway through the entire property, and by numerous private ways crossing the railway line as shown by the plats. This is all the law requires and the owners may exact no more.

The Railroad Company has *permitted* the Richfield Company to put underground pipe lines across its right of way for intra-corporate property use and service. *Permission*, however, is not a *right*. In fact, the gift of such *permission* carries the implicit recognition by its recipient that no *right* subsists.

Moreover, the right to pierce the Railroad's line, as conferred by the Court, is not single, but multiple and at will. The privilege created is not in the exercise of any natural usufruct of the land. The oil is not a product of the land. It is a commercial article produced by the art and labor of the appellant. The laying of the proposed pipe line is not to produce or utilize any yield of

the land, but to provide transportation by the refiner of a manufactured article for delivery to a competing railway carrier for a railway delivery to the customers of the appellant. The use is, therefore, not indigenous, but wholly artificial.

Further argument is indicated by the novelty of the case, and its dangerous incidence because of the peculiar nature of a railway right of way, which is not in law the familiar easement in land, as known to the law of real property. To guard against the dangers of railway operation and to assure the safety, security and dispatch of passenger and freight service, the railway carrier's possession is exclusive at all times. None but the carrier is charged with the duty and responsibility of the possession, care and operation of its property. So, none but the carrier should have the power, in the exercise of a reasonable discretion, to decide what extraneous use of its roadbed may be made by a third party.

A.

In the construction of a deed, it must be considered as a whole (*a*); and the intention of the parties as it appears from the whole instrument must control, giving to every word its due force; and reading in the light of existing conditions and circumstances (*b*), with terms of doubtful meaning construed most strongly against the grantors.

(*a*) Neavitt v. Lightner, 155 Md. 365
Marden v. Leimbach, 115 Md. 206
Maryland State Fair v. Schmidt, 147 Md. 613
Weinbeck v. Dahms, 134 Md. 464
Winter v. White, 70 Md. 305
Bowie v. Western Md. R. R. Co., 133 Md. 1
Roberts v. Roberts, 102 Md. 131.

(b) Campbell v. Whitehouse, 122 Md. 409, 120 A. 529
Buckner v. Hesson, 159 Md. 461
Hammond v. Hammond, 159 Md. 563
Gassinger v. Thillman, 160 Md. 194.

Furthermore, as pointed out in the opinion, Sections 11 and 12 of Article 21 of the Code provide: (Secs. 12 and 13 of Article 21 of the Code, 1939):

11. No words of inheritance shall be necessary to create an estate in fee simple, but every conveyance of real estate shall be construed to pass a fee simple estate, unless a contrary intention shall appear by express terms or be necessarily implied therein.

12. The word "grant", the phrase "bargain and sell", in a deed, or any other words purporting to transfer the whole estate of the grantor shall be construed to pass to the grantee the whole interest and estate of the grantor in the lands therein mentioned, unless there be limitations or reservations showing, by implication, or otherwise, a different intent.

It is respectfully urged that, in the application of these rules of construction, the court acted under a misapprehension of the terms of the conveyances under review and their legal effect. For the purpose of discussion and a more convenient consideration of the successive conveyances, they are here grouped chronologically and set forth in some detail. (*The more significant and important terms and phrases have been italicized for emphasis.*)

DEEDS OF MARCH 16, 1916, AND OF JANUARY 2, 1924.

The first conveyance of the United States Asphalt Refining Company to the Chesapeake and Curtis Bay Railroad Company was on March 16, 1916 (R. 43-48). The operative clause is that the Refining Company "doth grant unto the said Chesapeake and Curtis Bay Railroad Company, its successors and assigns, *the rights of way for railroad purposes* in and to that *part* of the *lands* of the United States Asphalt Refining Company at Wagner's Point in Anne Arundel County, Maryland, and described as follows that is to say:" Then follows a description of the land conveyed by courses and distances as delineated on a plat, marked "Exhibit A" pp. 43-48 of Record. The plat shows the location of the main track of the Railroad Company with its spur lines or tracks on the land of the grantor. The main line is laid from the pier head line of Curtis Bay to the south in a northerly direction through the property of the grantor. From this main line a number of spurs or tracks extended to the east and west. The southernmost spur (Line "A") extended eastward so as to bind upon the southern and eastern boundary of The Texas Company whose product could be carried by Lines "A", "B" and "C" to the water line. The acreage conveyed was a total of 17.12 acres, and most of it, especially to the west had no trackage laid or indicated upon it. For instance, one section of about two hundred feet wide extended for approximately 1,200 feet eastwardly from the Fairfield road without any track upon it.

After the description of the nine parcels conveyed, there followed these provisions:

> "Saving and reserving however to the said the United States Asphalt Refining Company a *joint* use

in said *right of way and the tracts* (*sic, tracks*) thereon for the necessary switching and other uses for itself and its allied industries now or which may hereafter be located along said right of way * * *.

"Being a *part* of the *land* which by indentures at various times heretofore were acquired by the grantor.

"To have and to hold the said *described rights of way and the railroad tracks thereupon* unto and to the use of the said Chesapeake and Curtis Bay Railroad Company, its successors and assigns, subject however to the reserve *joint* use aforementioned.

"And the said the United States Asphalt Refining Company covenants that it will warrant specially the *property* hereby conveyed, and that it will execute such other and further assurances of the same as may be requisite." (R. 47)

A second deed of January 2, 1924, conveyed by description nine additional *parcels of land* in the same manner and terms as the deed of March 16, 1916 (R. 48-52).

Apart from the variation caused by the difference in the parcels of land described, these two deeds are identical in terms and provisions. The term right of way when used in connection with a railroad, if it is intended to be a mere easement of a right of way, that is of having railroad trains pass over the grantor's land, is necessarily an easement in gross and not an easement appurtenant. A right of way is frequently more than this easement of a mere right of way. As when it is a strip of land actually owned by the railroad company on which the tracks are located. Tiffany on Real Property (2nd Ed.) Sec. 358, p. 1250.

The estate acquired by the grants is settled by the deeds of conveyance. From the language of these deeds,

it is clear that more than a mere right of way or passage was intended to be conveyed. The grant ran to the grantee, its successors and assigns, and it was for "the rights of way for railroad purposes", in and to separately described parcels of land, whose metes and bounds were given. The plats which were filed with the deeds showed the main track and its spurs and switches as then in actual railway use and an *excess* of land beyond the mere right of way requirements. That the land conveyed was designed for something more than a railroad's right of way is thus irrefutably shown by the words of the deeds and, graphically, by the plats which were annexed and made a part of these deeds.

Furthermore, and consonant with this conclusion is the reservation in both deeds of the only right in the parcels granted which the grantor retained. This was the *joint* use in said right of way and tracks thereon for the necessary switching and other uses and purposes for itself and its allied industries now or which may hereafter be located along said right of way. The maxim *expressio unius exclusio alterius* applies. Its effect is to exclude any other reservation and to enforce the conclusion that the grants were not of a mere easement for a railroad right of way, but of the several described parcels for a designated special use, that is, for railroad purposes, including, as is manifest from context provisions and plats of the deeds when each is taken as a whole. New Mexico v. United States Trust Company, 172 U. S. 171; Arkansas Improvement Co. v. Kansas City, Southern Railway Company, 189 La. 921, 181 S. R. 445.

It follows that in holding an absolute fee did not pass by this deed, and that a mere easement of right of way, with the absolute fee on the land, remaining in the

grantor, the court did not consider the construction that the grants were of a qualified, base or determinable fee, which gave to the grantee exclusive possession and enjoyment, except, and only, as to the particular reservation made as to switching and uses for the benefit of the grantor, of the parcels of land described so long as the grantee, its successors and assigns uses these parcels for railroad purposes.

As stated by Venable:

> "The tenant of this estate has all the powers and privileges of a tenant in fee simple, and the estate has the same incidents, during its continuance as an estate in fee simple." Syllabus of Law of Property in Land, Venable (Brodie ed.) p. 13.
>
> State v. Brown, 27 N. J. L. 13.

On the 11th of September, 1925, the Chesapeake and Curtis Bay Railroad Company and the United States Asphalt Refining Company executed a third deed for the purpose of further defining and limiting their respective rights of property. The first recital sets forth the two deeds and affirms that the Refining Company had conveyed the right of way for railroad purposes and these lands "The Chesapeake and Curtis Bay Railroad Company" intended to use for the operation of the said Company, and had so used the larger part of these lands, but certain small portions had not been so used or considered necessary for use for the operation of the railroad and on the other hand certain other small portions of the contiguous land of the Refining Company may have been so used for the operation of the railroad. The deed then recites that the "land actually in the possession of the said The Chesapeake and Curtis Bay Railroad Company and used by it in the operation of its railroad has

been recently surveyed and is embraced within the description" set forth in the deed; and then the concluding recital is in these clear and precise terms:

> "And whereas it is the purpose and intention of the Deed that that *portion of said land heretofore conveyed* by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company, which has not been occupied by the said The Chesapeake and Curtis Bay Railroad Company and used by it in the operation of its railroad as aforesaid, and not embraced within this description hereinafter set out, and not delineated on the plat hereto annexed shall be *reconveyed* by the said The Chesapeake and Curtis Bay Railroad Company to the said The United States Asphalt Company, and that the lot of land hereinafter described and delineated in said plat (which embraces *part of the lot of* ground *heretofore conveyed* by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company and such other *portion* of said land of the said The United States Asphalt Refining Company used by the said The Chesapeake and Curtis Bay Railroad Company for the operation of its road as were not included in said Deeds) shall *be conveyed* by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company."

After these recitals of the factual situation with respect to the relative title and use of the land by the Railroad Company, the granting clauses of the deed follow, and are of this tenor:

> "Now therefore this deed witnesseth that for and in consideration of the premises, and of the sum of One Dollar, the said The Chesapeake and Curtis Bay Railroad Company doth grant, assign and reconvey unto the said The United States Asphalt Refining

Company, its successors and assigns, its right, title and interest in and to all that portion of land heretofore conveyed by the said The United States Asphalt Refining Company to the said the Chesapeake and Curtis Bay Railroad Company as is not embraced within the description of the lots of ground hereinafter conveyed by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company and delineated on the plat hereto annexed.

Together with all and every the rights, alleys, ways, waters, privileges, appurtenances and advantages to the same belonging, or anywise appertaining.

To have and to hold the same unto and to the use of the said The United States Asphalt Refining Company, its successors and assigns, in the same manner as if the same had not heretofore been conveyed by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company."

The deed then proceeds as follows:

"And this deed further witnesseth, that for and in consideration of the premises, and of the sum of One Dollar, the said United States Asphalt Refining Company doth grant, convey and assign unto the said The Chesapeake and Curtis Bay Railroad Company, its successors and assigns, the rights of way for railroad purposes in and to the following lots or tracts of ground situate lying and being in the City of Baltimore, and described as follows, (subject, however to the reservations hereinafter set forth) to wit"

Then follows a separate description of nine parcels of land, with the heading "Parcel No. 1" to 9, both inclusive, and a sub-title "Main Track and Yards" for Parcel No. 1,

containing 8.967 acres of land, more or less; and sub-title of "Right of Way for tracks 38-47-48" for "Parcel No. 2" containing 3.510 acres of land, more or less" and a similar heading for Parcels 3 to 9, both inclusive. After these courses and distances, the deed identifies these parcels, and then concludes as here set forth:

> "Being all that portion of the lots of ground heretofore conveyed by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company by the deeds hereinbefore recited and the right of way for railroad purposes in such other land of the said The United States Asphalt Refining Company not heretofore conveyed to the said The Chesapeake and Curtis Bay Railroad Company, as is now used by the said The Chesapeake and Curtis Bay Railroad Company in the operation of its railroad as aforesaid.
>
> Together with all and every the rights, alleys, ways, waters, privileges, appurtenances and advantages, to the same belonging, or anywise appertaining.
>
> To have and to hold the said described right of way and the railroad tracks thereon unto and to the use of the said The Chesapeake and Curtis Bay Railroad Company, its successors and assigns, saving and reserving, however, to the said The United States Asphalt Refining Company, its successors and assigns, and to the Interocean Oil Company, a corporation duly incorporated, its successors and assigns a joint use in such parts of said right of way as may now be occupied by any tanks, stills or build ings of the said The United States Asphalt Refining Company and the said The Interocean Oil Company, now erected thereupon, and for such time as the same may remain thereupon."

There was a covenant of special warranty of the property thereby granted and a due execution and delivery

of this deed by the parties thereto. The effect of this joint deed was to reduce the quantity of land which had been previously granted the Railroad Company and correspondingly increased the acreage of the Asphalt Company.

The deed last mentioned of September 11, 1925, was made in contemplation of the sale of the entire property of the Asphalt Company to the Interocean Oil Company. The sale was closed by the deed of the Asphalt Company, dated October 5, 1925. The description adopted in the granting clause of this deed was to describe the land so as to embrace an area of 107.72 acres, more or less, and then to fix and define what was intended to be conveyed by excluding from this area the grants which had been theretofore made by the Asphalt Company to the Chesapeake and Curtis Bay Railroad Company by this reservation.

> "Saving and Excepting however, from the above described land *such portions* as is described and conveyed to the Chesapeake and Curtis Bay Railroad Company by and in a deed of exchange and in the annexed hereto made between the said United States Asphalt Refining Company and the Chesapeake and Curtis Bay Railroad Company dated September 11, 1925, with the benefit however, to the said party of the second part, its successors or assigns of the reservations mentioned in said deed of exchange relating to the joint use of such parts of the right of way of said railroad as may now be occupied by any tanks, stills or buildings therein as recited in said deed." (R. 52-53)

On even date with the above deed, the Interocean Oil Company, grantee, executed a deed of trust to the Century Trust Company of Baltimore conveying the land obtained from the Asphalt Company to secure the pay-

ment of the principal and interest of mortgage bonds to be issued by the Interocean Oil Company. In this deed of trust the above exemption is incorporated in the language here quoted.

The title of the tract conveyed, with the exception of a small portion of land immediately north of the Texas Oil Company, remained unchanged until the deed from Joseph P. Connor, Special Master, to the Richfield Oil Corporation of New York, dated October 6, 1939, conveyed with the small exception mentioned, the whole property of 104 acres owned by the Asphalt Company and later, by the Interocean Oil Company of Delaware. The property was sold and conveyed:

> "Subject also to the grant of various railroad rights of way by deed between United States Asphalt Refining Company and The Chesapeake and Curtis Bay Railroad Company dated September 11, 1925, and recorded among the Land Records of Baltimore City in Liber S. C. L. No. 4665, folio 321, said railroad rights of way being an area of approximately thirteen (13) acres of land, more or less." (R. 13-14)

There can be no doubt from this full statement of the chain of title that the deed of September 11th, 1925, is determinative of the rights and estates of the parties to this conveyance; and that the Richfield Oil Corporation of New York can have no greater estate, nor more rights than its predecessor in title, the United States Asphalt and Refining Company. Turning then to this key deed, it is clear that its primary object was to define and delimit the estates and rights of the parties with reference to their respective property rights and future ownership of the entire tract of land. The parties to the conveyance in their combined ownership united every interest

and estate in this tract, which was traversed by the Railroad Company. The conveyance which they selected as the final memorial of their respective rights and estates on the tract was drawn by skilled draughtsmen, and the intention of the parties is clearly expressed by its sole repository, and should be given effect as required by every canon of construction.

This warranty deed declares that it is the purpose and intention of the parties that the Asphalt Company convey to the Railroad Company all that lot of ground hereinafter described and delineated on said plat (*which embraces part of the lot of ground heretofore conveyed by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Company, and said other portion of said land of the said The United States Asphalt Refining Company used by the said The Chesapeake and Curtis Bay Company for the operation of its railroad as were not included in said deeds*) shall be conveyed by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company.

Without further wearisome repetition, it is enough to say that the Railway Company simply and definitely granted to the Asphalt Company only those portions of the parcels of land which had been theretofore granted it by the Asphalt Company but which portions were not included in the description of the ground which was to be conveyed by the same instrument by the Asphalt Company to the Railroad Company.

If the Railroad Company had only an easement in these portions of land so granted, assigned and reconveyed to the Asphalt Company, a simple release of the

right of way would have been sufficient. The draughtsman was better advised. The grant was not in the form of a release of a right of way, but of a conveyance of a fee; and was followed by the clause: "Together with all and every, the rights, alleys, ways, waters, privileges, appurtenances and advantages to the same belonging or in anywise appertaining", which is the sufficient negation that a right of way or easement was the subject matter of the grant.

The form of conveyance by the Asphalt Company to the Railroad Company was "doth grant, convey, assign unto the said The Chesapeake and Curtis Bay Railroad Company, its successors and assigns, the rights of way for railroad purposes in and to the following lots or tracts of ground situate, lying and being in the City of Baltimore and described as follows (subject however to the reservation hereinafter set forth) to wit"

As has been stated the description is first of "Parcel No. 1—Main Tracks and Yards" and then of eight other parcels, which are at the close of the description, characterized as "Being all that portion of the lots of ground heretofore conveyed by the" Asphalt Company to the Railroad Company, "*and* the right of way for railroad purposes in such other land of the said" Asphalt Company not heretofore conveyed to the said Railroad Company as now used by the Railroad Company in the operation of its railroad as aforesaid.

Then there is incorporated the paragraph "Together with all and every the rights, alleys, ways, waters, privileges, appurtenances and advantages to same belonging, or in anywise appertaining", which is applicable to a grant of land but not to an easement of right of way.

And then the tenendum is of the "described right of way and the railroad tracks thereon unto and to the use "of the Railroad Company, its successors and assigns, saving and reserving, however, to the said The United States Asphalt Refining Company, its successors and assigns, and to The Interocean Oil Company, a corporation duly incorporated, its successors and assigns, a *joint* use in such parts of said right of way as may now be occupied by any tanks, stills or buildings of the said The United States Asphalt Refining Company and the said The Interocean Oil Company, now erected thereupon, and for such time as the same may remain thereupon. Surely a mere easement of right of way would not have upon it such structures nor would the grantor covenant that it would warrant specially *the property* thereby granted, if only a right of way was intended to pass.

It is earnestly urged upon your Honorable Court that further consideration should be given to the contention that by the clear wording and necessary implication of the grant, the Railroad Company acquired a base, qualified or determinable fee in the parcels conveyed.

NO TITLE OF THE RICHFIELD OIL CORPORATION.

As has been seen the deed from the Asphalt Company to the Interocean Oil Company of Delaware, dated October 5, 1925, is a grant in fee simple, and first describes the outside limits of the entire area of land owned by both the Asphalt Company and the Railroad by metes and bounds, and then, from this all inclusive description of the whole area, excludes the land conveyed to the Railroad in these explicit words: "saving and excepting, however, from the above described land such por-

tions as is (sic) described and conveyed" to the Railroad in the deed of September 11, 1925, from the Asphalt Company to Railroad, "with the benefit, however," to the Asphalt Company, its successors or assigns, of the reservation mentioned in said deed relating to the joint use of such parts of the right of way of the Railroad as may now be occupied by any tanks, stills or buildings thereon as recited in said deed (R. 52-53).

In the trust indenture of the Interocean Oil Company to the Century Trust Company, dated October 5, 1925, to secure the bonds to be issued by the grantor the same description is followed. Nothing could be more evident and definite and certain that, by these exclusions of the parcels of land described in the deed of the Asphalt Company to the Railroad Company, no title to the land described in the grants to the Railroad Company passed either to the Interocean Oil Company or from the Interocean Oil Company to the Century Trust Company, or from the deed of Joseph P. Connor, as Special Master for the sale of all the property of the Interocean Oil Company which was subject to the trust deed to the Richfield Oil Corporation of New York.

It is to be observed that the exclusion from these grants is not of an incorporeal hereditament, as a right of way, but *parcels* of land as described by metes and bounds, courses and distances. First the whole tract of land is described, and from this land so described such "portions" of this *land* are saved and excepted from the grant of the Asphalt Company to the Interocean Oil Company. Even if it be conceded, that the Asphalt Company had the fee in such described portions of land, it carefully refrained from conveying this fee to the Interocean Oil Company.

One searches in vain for a scintilla of testimony that the Richfield Oil Corporation of New York has any title of any kind to the land described in the grants to the Railroad Company. A deed does not convey what it expressly saves and excepts from the grant.

In conclusion, your petitioners beg leave to call upon your Honorable Court to contemplate the consequences upon railway property rights of the decision, whose immediate effect upon the appellees is insignificant in comparison with its effect upon property throughout the State, and to afford the appellees a re-argument in order that the Court may have an opportunity of reconsidering the problems raised by the instant appeal.

Respectfully submitted,

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F. NEAL PARKE,
Solicitors for Appellees.